2012

Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation

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STANDING FOR PRIVATE PARTIES IN GLOBAL WARMING CASES: TRACEABLE STANDING CAUSATION DOES NOT REQUIRE PROXIMATE CAUSATION

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2012 MICH. ST. L. REV. 869

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INTRODUCTION

This Article argues courts should apply a relatively liberal approach in deciding standing issues for private plaintiffs pursuing climate change suits, even if courts ultimately conclude that it is inappropriate to grant relief on the merits to those same plaintiffs. The Supreme Court has clearly declared that standing is a preliminary question that should be treated separately from decisions on the merits, and standing causation requires less proof than proximate causation on the merits.[1] The Supreme Court in its 2007 decision

1. *See infra* Sections VI.A-B. This Article is one of a series of explorations of modern standing doctrines. The other pieces are: (1) Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) [hereinafter Mank, *States Standing*]; (2) Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009) [hereinafter Mank,

in *Massachusetts v. EPA*[2] held that a state had standing under Article III of the U.S. Constitution to bring suit against the federal government for its failure to regulate greenhouse gas (GHG) emissions that arguably cause global climate change, despite the highly diffuse and generalized nature of the harms involved, because states are "entitled to special solicitude in our standing analysis."[3] *Massachusetts* did not directly address whether private parties have similar standing rights to bring climate change suits against the federal government or large private GHG emitters, but implied that private parties might have lesser standing rights when it declared that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."[4] While there are important historical distinctions between standing in public and private rights cases, modern standing doctrine does not clearly distinguish between private and public right cases, although courts sometimes make distinctions to a degree.[5] Because the decision failed to address many distinctions between private and public rights in prior standing cases, the *Massachusetts* decision's invocation of special standing rights for states raised more questions than it answered about the standing rights of private parties in climate change cases.[6]

Because the Supreme Court has consistently treated Article III standing as a preliminary jurisdictional question that should be decided separately from decisions on the merits, this Article contends that courts in certain circumstances should recognize standing for private plaintiffs pursuing cli-

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Standing and Future Generations]; (3) Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009) [hereinafter Mank, *Standing and Statistical Persons*]; (4) Bradford Mank, Summers v. Earth Island Institute *Rejects Probabilistic Standing, but a "Realistic Threat" of Harm Is a Better Standing Test*, 40 ENVTL. L. 89 (2010); (5) Bradford Mank, *Revisiting the* Lyons *Den:* Summers v. Earth Island Institute*'s Misuse of* Lyons*'s "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837 (2010); (6) Bradford C. Mank, Summers v. Earth Island Institute: *Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10958 (2010); (7) Bradford Mank, *Standing in* Monsanto Co. v. Geertson Seed Farms*: Using Economic Injury as a Basis for Standing When Environmental Harm Is Difficult to Prove*, 115 PENN ST. L. REV. 307 (2010); (8) Bradford C. Mank, *Informational Standing After* Summers, 39 B.C. ENVTL. AFF. L. REV. 1 (2012); (9) Bradford C. Mank, *Reading the Standing Tea Leaves in* American Electric Power Co. v. Connecticut, 46 U. RICH. L. REV. 543 (2012) [hereinafter Mank, *Tea Leaves*]; (10) Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing Than to Justice Scalia's*, 50 HOUS. L. REV. 71 (2012).

2. 549 U.S. 497 (2007).

3. *Id.* at 520.

4. *Id.* at 518. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-78 (1992), the Supreme Court concluded that Article III and possibly Article II of the Constitution limited Congress' authority to authorize citizen suits by any person lacking a concrete personal injury.

5. *See infra* Section I.B.

6. Mank, *States Standing*, *supra* note 1, at 1733-34, 1746-47, 1755-56.

mate change suits even if courts ultimately conclude that it is inappropriate to grant relief on the merits to those same plaintiffs.[7] Furthermore, the Supreme Court has recognized that there is a lower threshold for standing causation than for proximate causation on the merits,[8] despite the argument of defendants and some academics that courts should use the more complicated and stringent proximate causation standard in standing decisions.[9] In particular, Sections VI.A and VI.B will explain why standing is a preliminary question requiring a lesser amount of evidence and why standing causation should be treated as separate from proximate causation on the merits.[10] The desire of defendants for an efficient resolution of their case is not an appropriate basis for a court to distort the doctrine of standing even if the judge believes that the plaintiffs will be ultimately unsuccessful on the merits, although courts may limit discovery and use other procedural methods to expedite resolution of the case on the merits.[11] Sections VI.C and VI.D demonstrate that courts should give greater preference to private suits seeking damages and be less willing to accept private suits seeking injunctive relief, which are better addressed by sovereign state suits.[12]

Lower courts have divided regarding whether private parties have standing in climate change cases. In *Connecticut v. American Electric Power Co.*, the U.S. Court of Appeals for the Second Circuit held that both the state plaintiffs and the private plaintiffs had standing to bring public nuisance actions against large electric utility companies that own power plants that emit significant amounts of GHGs because they demonstrated harm to coastal property they owned that was being inundated by rising sea levels caused by climate change.[13] By contrast, however, in *Native Village of Kivalina v. ExxonMobil Corp.*,[14] the District Court for the Northern District of California concluded that the plaintiffs, the Village of Kivalina, whose inhabitants are a self-governing, federally-recognized Tribe of Inupiat Eskimos, could not prove standing causation in a public nuisance action against

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7. *See infra* Section VI.A.

8. *See* Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009) (citing Bennet v. Spear, 520 U.S. 154, 168 (1997) and holding standing causation requires less proof than merits proximate causation), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc). *See generally infra* Section VI.B.

9. *See* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1245-46, 1297-99 (2011) (arguing "the Court should reformulate the causation prong of standing to clarify that standing requires a proximate cause, rather than a cause in fact, analysis" so that standing law can serve a gatekeeping function); *see generally infra* Section VI.B.

10. *See infra* Sections VI.A-B.

11. *See infra* Section V.D.

12. *See infra* Sections VI.C, VI.D.

13. 582 F.3d 309, 341-44 (2d Cir. 2009), *rev'd and remanded on other grounds*, 131 S. Ct. 2527, 2540 (2011).

14. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

several oil, energy, and utility companies for causing substantial GHG emissions that contribute to global warming.[15] The court found they could not trace the Village's harms to specific actions of the defendants in emitting GHGs and that any possible connection was too attenuated to support standing.[16] In 2012, the Ninth Circuit affirmed the district court's dismissal in *Kivalina* on the ground that the Clean Air Act displaced the plaintiff's federal common law public nuisance claims, but did not address the standing issues.[17]

In *American Electric Power Co. v. Connecticut* (*AEP*),[18] the Supreme Court, by an equally divided vote of four to four, affirmed the Second Circuit's decision finding standing and jurisdiction in the case.[19] The Court stated, "Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars review."[20] The Court did not identify the "some plaintiffs," but commentators have speculated that the four justices affirming the Second Circuit's decision on standing may have agreed only that the state plaintiffs had standing.[21] Again, as in *Massachusetts*, the Court did not directly address the standing rights of private plaintiffs.[22]

In a series of decisions involving *Comer v. Murphy Oil*, the District Court for the Southern District of Mississippi and various judges on the U.S. Court of Appeals for the Fifth Circuit have reached differing conclusions on the standing rights of private plaintiffs in global warming litigation.[23] The very complicated history of *Comer* will be discussed in Part V.[24] Most recently, after the plaintiffs refiled their complaint in *Comer*, the District Court for the Southern District of Mississippi held that the private plaintiffs did not have standing to sue.[25] The *Comer* plaintiffs are appealing the district court's dismissal to the Fifth Circuit.[26] Sections V.B, V.D, and

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15. *Id.* at 883.

16. *Id.* at 878-81.

17. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012), petition for en banc review denied (9th Cir. Nov. 27, 2012).

18. 131 S. Ct. 2527 (2011).

19. *See id.* at 2535 & n.6; *see also* Mank, *Tea Leaves*, *supra* note 1, at 590.

20. *Am. Electric Power Co.*, 131 S. Ct. at 2535 (citations omitted); *see also* Mank, *Tea Leaves*, *supra* note 1, at 590.

21. Mank, *Tea Leaves*, *supra* note 1, at 591-92.

22. *Id.* at 599.

23. *See infra* Part V.

24. *See infra* Part VI.

25. Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 858-62 (S.D. Miss. 2012).

26. Megan L. Brown & Roger H. Miksad, *Global Warming Nuisance Suits Given a Cool Reception in Court*, CLASS ACTION WATCH, June 20, 2012, at 1, 9, *available at* http://www.fed-soc.org/doclib/20120620_BrownMiksadCAW11.1.pdf.

VI.B argue that a three-judge panel decision of the Fifth Circuit correctly determined that the plaintiffs had standing because there is a lower threshold for standing causation than for proximate causation on the merits.[27]

This Article proposes, in Sections VI.C and VI.D, criteria for addressing when it is appropriate to recognize standing for private parties filing suits involving climate change challenges.[28] If a state plaintiff has articulated similar claims, the *Massachusetts* decision arguably implies that federalist principles favor suits by sovereign states over duplicative private claims.[29] That is especially true if the plaintiffs are seeking overlapping or duplicative injunctive relief.[30] On the other hand, if plaintiffs like the Comers have alleged unique injuries that no state plaintiff has asserted, then standing is presumptively appropriate if a plaintiff alleges a plausible connection between its injuries and the defendant's actions, especially if the plaintiff is seeking individualized damages in a state common law nuisance action.[31] The proposed approach by this Article suggests that courts should not recognize standing for private plaintiffs like those in the *AEP* decision who seek duplicative injunctive relief also sought by state plaintiffs, but that the *Comer* plaintiffs possibly should be able to prove standing if they present plausible claims for individualized damages.[32]

Part I discusses the basics of constitutional and prudential standing doctrines. Part II examines the *Massachusetts* decision's creation of a special state standing doctrine in a climate case. Part III explores the Second Circuit's decision in *AEP* recognizing standing for both states and private parties and the possible implications of the Supreme Court's affirmance of that decision by an equally divided vote. Part IV summarizes the district court and Ninth Circuit decisions in *Kivalina*. Part V explains a district court's rejection of private party standing in *Comer*; a three-judge panel decision concluding the parties had standing; how the panel decision was vacated by the en banc Fifth Circuit; how the Fifth Circuit lost its quorum; and how the district court again rejected standing when the plaintiffs re-filed their complaint. Part VI argues that courts should decide standing separately from the merits, that standing causation requires a lower burden of proof than proximate causation on the merits, and the differences when private parties seek duplicative injunctive relief as opposed to individualized damages.

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27. *See* Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); *infra* Sections V.B, V.D and VI.B.

28. *See infra* Sections VI.C-D.

29. *See infra* Section VI.C.

30. *See infra* Section VI.C.

31. *See infra* Section VI.D.

32. *See infra* Sections VI.C-D.

I. STANDING BASICS[33]

A. Constitutional Standing

Although the Constitution does not explicitly require a plaintiff to possess "standing" to file suit in federal courts, since 1944 the Supreme Court has inferred from the Constitution's Article III limitation of judicial decisions to "Cases" and to "Controversies" that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and stake in a case.[34] "Those two words ['Cases' and 'Controversies'] confine 'the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'"[35] The federal courts have jurisdiction over a case only if at least one plaintiff can prove standing for each form of relief sought.[36] A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test.[37]

Standing requirements are related to broader constitutional principles. Standing doctrine prohibits unconstitutional advisory opinions.[38] Furthermore, standing requirements support separation of powers principles defining the division of powers between the judiciary and political branches of

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33. The discussion of standing in Part I relies upon my earlier standing articles cited in footnote 1.

34. Article III of the Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2; *see also* Stark v. Wickard, 321 U.S. 288, 310 (1944) (stating explicitly the Article III standing requirement in a Supreme Court case for the first time); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 339-41 (2006) (explaining why Supreme Court infers that Article III's Case and Controversy requirement necessitates standing limitations). *See generally* Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE W. RES. L. REV. 1023, 1036-38 (2009) (discussing debate whether Constitution implicitly requires standing to sue).

35. Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

36. Mank, *States Standing*, *supra* note 1, at 1710; *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

37. *Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.").

38. *DaimlerChrysler*, 547 U.S. at 340.

government so that the "Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"[39] There is disagreement, however, regarding to what extent separation of powers principles limit the authority of Congress to authorize standing to sue in federal courts for private citizens challenging alleged executive branch under-enforcement or non-enforcement of congressional requirements mandated in a statute.[40]

For constitutional standing, the Court has used a three-part standing test that requires a plaintiff to show that: (1) she has "suffered an 'injury in fact,'" which is (a) "concrete and particularized" and (b) "actual or imminent, not 'conjectural' or 'hypothetical'"; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court'"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[41] A plaintiff has the burden of establishing all three prongs of the standing test.[42] This Article will focus on the second traceable causation prong because that prong is the most controversial in private climate change litigation.[43]

B. Private Versus Public Standing Rights

There are important historical distinctions between standing in public and private rights cases.[44] "Under early English and American practice, a private individual could bring suit only to vindicate the violation of a private, as opposed to a public, right."[45] Under English common law, only the King or his agents could prosecute the alleged violation of public rights

39. *Id.* at 339-41 (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)) (internal quotations omitted); *see also* Mank, *States Standing*, *supra* note 1, at 1710.

40. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-78 (1992) (concluding Article III and Article II of Constitution limit Congress's authority to authorize citizen suits by any person lacking a concrete injury), *with id.* at 602 (Blackmun, J., dissenting) (arguing that the "principal effect" of Justice Scalia's majority opinion's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense —not of the courts—but of Congress, from which that power originates and emanates"). *See also* Heather Elliott, *The Functions of Standing*, 61 STAN. L REV. 459, 496 (2008) (arguing courts should not use standing doctrine as "a backdoor way to limit Congress's legislative power").

41. *Lujan*, 504 U.S. at 560-61 (citations and internal quotations omitted).

42. *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must "carry the burden of establishing their standing under Article III"); LARRY W. YACKLE, FEDERAL COURTS 336 (3d ed. 2009).

43. *See* Mary Kathryn Nagle, *Tracing the Origins of* Fairly Traceable*: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 481, 498-99, 510-17 (2010).

44. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279-86 (2008).

45. *Id.* at 279.

such as the navigation of public waters or public highways.[46] By contrast, beginning with the American Revolution through the nineteenth century, American courts typically followed the English rule that the violation of every private right carried a remedy, and therefore awarded nominal damages for violations of private rights that did not result in harm.[47]

During the twentieth century, the relationship between public and private law became more complicated, but there remained important distinctions between the two categories.[48] The government is still more likely to take a leading role in enforcing public rights;[49] the discussion of the *Massachusetts* decision in Part II will demonstrate that states have special rights to protect their natural resources.[50] But private individuals may now sue to vindicate constitutional or statutory rights in ways that pre-1900 courts would not have recognized.[51]

Standing doctrine originally developed from the principle that private parties could only enforce private rights and not public rights.[52] Modern standing doctrine recognizes that private parties may enforce some types of public rights if a statute or constitutional provision creates a private right of action, a plaintiff has suffered a personal injury, and the suit does not violate separation of powers principles.[53] Because current standing doctrine does not clearly distinguish between how litigants in private and public rights cases must meet the three-part standing test discussed above, there are many uncertainties about how standing principles apply, respectively, in public and private rights cases.[54] Arguably, courts should apply a more lenient standing test in common law private rights suits against private defendants than in public rights suits against the government that raise separation of powers concerns.[55] However, federal district court decisions in private cli-

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46. *Id.* at 279-80.
47. *Id.* at 284-86.
48. *See id.* at 286-89.
49. *Id.* at 286.
50. *See infra* Subsection II.A.1.
51. Hessick, *supra* note 44, at 286-89.
52. *Id.* at 289.
53. *Id.* at 289-90.
54. *Id.* ("The consequence [of ignoring the distinction between public and private rights] has been the development of a confused and confusing body of [standing] law."); Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1073 (2011) ("Despite its primary focus on the separation of powers as a justification for restrictive standing, the Supreme Court has never clearly distinguished private rights from public rights lawsuits for standing purposes.").
55. Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009) (arguing that the private suit in *Comer* involved one less step than the federal regulation in *Massachusetts*), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); Hessick, *supra* note 44, at 299-300, 310-17, 324-27 (arguing courts should not require

mate change tort suits, including *Comer* and *Kivalina*, have applied a strict standing causation standard to dismiss these cases.[56]

C. Prudential Standing

In addition to constitutional Article III standing requirements, federal courts may impose prudential standing requirements for various judicial policy reasons:

> Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[57]

The Supreme Court's prudential standing doctrine is arguably more open to interpretation than its constitutional standing doctrine.[58] Congress may enact legislation to override prudential limitations, but must "expressly negate" such limitations.[59]

D. Generalized Grievances

The Supreme Court has been unclear regarding whether its restriction on suits alleging "generalized grievances,"[60] a term which courts sometimes use to refer to suits involving large segments of the public or to suits where a citizen who has no personal injury seeks to force the government to obey a duly enacted law, is a prudential limitation or a constitutional one.[61] In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[62] for example, the

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proof of standing injury in private rights cases); Nagle, *supra* note 43, at 510-15 (criticizing strict standing causation in private climate suits as unwarranted in private rights cases).

56. *See supra* Sections IV.A, V.D.

57. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737 (1984)).

58. *See id.* ("[W]e have not exhaustively defined the prudential dimensions of the standing doctrine."); Bradford, *supra* note 54, at 1079 (describing prudential standing doctrine as "a malleable framework").

59. Bennett v. Spear, 520 U.S. 154, 163 (1997).

60. YACKLE, *supra* note 42, at 342 ("The 'generalized grievance' formulation is notoriously ambiguous."); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1884-92 (1996) ("Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.").

61. *See* YACKLE, *supra* note 42, at 342-45 (discussing debate in Supreme Court regarding if rule against generalized grievances is constitutional rule or non-constitutional policy waivable by Congress); Mank, *States Standing*, *supra* note 1, at 1710-15; Solimine, *supra* note 34, at 1027 n.14.

62. 438 U.S. 59 (1978).

Supreme Court held that a court could deny standing in a suit involving generalized harms to large numbers of the public because such a suit would raise "general prudential concerns 'about the proper—and properly limited—role of the courts in a democratic society.'"[63] Subsequently, however, in *Public Citizen v. U.S. Department of Justice*,[64] the Court rejected the argument that plaintiffs seeking information that the government had a statutory obligation to provide were barred from standing because they alleged a generalized grievance, since many other citizens were entitled to request the same information.[65]

In *Federal Election Commission v. Akins*, the government argued that the plaintiffs, who sought information from the Federal Election Commission because the information allegedly could assist their voting decisions, should not have standing because they had suffered only a generalized grievance common to all other voters.[66] The Court rejected the government's argument that the informational injury to the plaintiffs was too abstract or generalized to constitute a concrete injury or that it violated judicially imposed prudential norms against generalized grievances because the statute specifically authorized the right of voters to request information from the Commission and, therefore, overrode any prudential standing limitations against generalized grievances.[67] The Court distinguished prior cases that had applied judicially-imposed prudential norms against generalized grievances by reasoning that it would deny standing for widely shared, generalized injuries only if the harm is both widely shared and also of "an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'"[68] *Akins* stated that Article III standing was permissible even if many people suffered similar injuries as long as those injuries were concrete and not abstract.[69] The Court declared that the fact that "an injury

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63. *Id.* at 80 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 21-22 (2005).

64. 491 U.S. 440 (1989).

65. *Id.* at 449-50.

66. 524 U.S. 11, 19 (1998).

67. *Id.* at 13-14, 19-21; Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 678 (2007); Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

68. *Akins*, 524 U.S. at 23-24. The Supreme Court has not been clear on whether generalized grievances pose a constitutional or prudential barrier to standing, and the issue has been subject to much debate. Solimine, *supra* note 34, at 1027 n.14. The *Akins* decision implied that the rule against generalized grievances is only prudential in nature, but did not explicitly decide the issue. *See Akins*, 524 U.S. at 24-25 (1998); *accord* Mank, *Standing and Statistical Persons*, *supra* note 1, at 717 (discussing *Akins* as treating generalized grievances as prudential rule).

69. *Akins*, 524 U.S. at 24-25; Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, *where sufficiently concrete*, may count as an 'injury in fact.'"[70]

In his dissenting opinion in *Akins*, Justice Scalia argued that Article III prohibits all generalized grievances, even ones involving concrete injuries, because plaintiffs must demonstrate a "particularized" injury that "'affect[s] the plaintiff in a personal and individual way.'"[71] He contended that the *Akins* plaintiffs' alleged informational injury was an "'undifferentiated'" generalized grievance that was "'common to all members of the public'" and, therefore, that they must resolve it "by political, rather than judicial, means."[72] More broadly, Justice Scalia dissented in *Akins* because he argued that generalized injuries to a large portion of the public are inherently unsuitable for judicial resolution and must be addressed by the political branches of government, specifically the Executive Branch under both Article III and the president's Article II "take care" authority to faithfully enforce the nation's laws.[73]

II. *MASSACHUSETTS V. EPA*: *PARENS PATRIAE* STATE STANDING[74]

In *Massachusetts*, the Supreme Court concluded that the Commonwealth of Massachusetts had standing to sue the EPA for failing to regulate GHGs emitted from motor vehicles allegedly causing climate change.[75] Notably, the Court for the first time recognized that states have greater standing rights in some circumstances than other litigants pursuant to the *parens patriae* doctrine.[76] Because global warming affects everyone in the world, however, Chief Justice Roberts' dissenting opinion in *Massachusetts* argued that states do not have greater standing rights than other litigants and also that the generalized injuries resulting from climate change are better addressed through the political process than the judiciary.[77]

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70. *Akins*, 524 U.S. at 24 (emphasis added); Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

71. *Akins*, 524 U.S. at 35 (Scalia, J., dissenting) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)); Mank, *Standing and Statistical Persons*, *supra* note 1, at 718.

72. *Akins*, 524 U.S. at 35 (quoting United States v. Richardson, 418 U.S. 166, 177 (1974)); *accord* Mank, *supra* note 63, at 39; Mank, *Standing and Statistical Persons*, *supra* note 1, at 718.

73. *Akins*, 524 U.S. at 35-37; Brown, *supra* note 67, at 702-03; Mank, *Standing and Statistical Persons*, *supra* note 1, at 719.

74. The discussion of *Massachusetts v. EPA* and *parens patriae* state standing in Part II is based on my earlier articles cited *supra* note 1.

75. Massachusetts v. EPA, 549 U.S. 497, 526 (2007).

76. *Id.* at 518-20; Mank, *Standing and Future Generations*, *supra* note 1, at 68.

77. *Massachusetts*, 549 U.S. at 536-37, 546-47 (Roberts, C.J., dissenting).

A. Justice Stevens' Majority Opinion on State Standing

1. *The Special Standing Rights of States*

The *Massachusetts* decision used the *parens patriae* doctrine as a justification for giving greater standing rights to states than other litigants.[78] The *parens patriae* doctrine developed as an English common law doctrine regarding the authority of the English king to protect incompetent persons, including minors, the mentally ill, and mentally limited persons.[79] Since the early twentieth century, federal courts have recognized that states may sue as *parens patriae* to protect their quasi-sovereign interests in the health and welfare of their citizens, as well as the natural resources available to them.[80]

Relying upon the *parens patriae* doctrine, Justice Stevens in his *Massachusetts* decision stated that "the special position and interest of Massachusetts" was important in determining standing.[81] He declared that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."[82] Citing Justice Holmes' 1907 *Georgia v. Tennessee Copper Co.* opinion, which authorized Georgia to sue on behalf of its citizens because of the state's quasi-sovereign interest in the state's natural resources and the health of its citizens, the *Massachusetts* decision observed that the Court had long ago "recognized that States are not normal litigants for the purposes of invoking federal jurisdiction."[83] Justice Stevens concluded in the *Massachusetts* decision that "[j]ust as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today."[84] Additionally, the *Massachusetts* court stated the fact that "Massachusetts does in fact own a great deal of the 'territory alleged to be affected,' which only reinforces the conclusion that its stake in the outcome of

78. *Id.* at 518-20 (majority opinion).

79. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (discussing briefly the history of the *parens patriae* concept); Mank, *States Standing*, *supra* note 1, at 1756-57.

80. *Massachusetts*, 549 U.S. at 519; Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907); Mank, *States Standing*, *supra* note 1, at 1757-58.

81. *Massachusetts*, 549 U.S. at 518.

82. *Id.* In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-78 (1992), the Supreme Court determined that Article III and possibly Article II of the Constitution circumscribed congressional authority to allow citizen suits by persons lacking a concrete individual injury.

83. *Massachusetts*, 549 U.S. at 518-19 (citing *Tenn. Copper Co.*, 206 U.S. at 237-38 (recognizing Georgia's independent interest in protecting its citizens from air pollution originating outside the state's borders)).

84. *Id.* at 519 (quoting *Tenn. Copper Co.*, 206 U.S. at 237).

this case is sufficiently concrete to warrant the exercise of federal judicial power."[85]

Further explicating the *parens patriae* doctrine, Justice Stevens explained that states had standing to protect their quasi-sovereign interest in the health and welfare of their citizens because they had surrendered three crucial sovereign powers to the federal government: (1) states may no longer use military force; (2) the Constitution prohibits states from negotiating treaties with foreign governments; and (3) federal laws may in some circumstances preempt state laws.[86] Because states had surrendered these three sovereign powers to the federal government, the Court invoked the *parens patriae* doctrine to preserve the role for the states in a federal system of government by recognizing that states can file suit in federal court to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens.[87]

Justice Stevens somewhat confusingly combined the *parens patriae* doctrine with other arguments for granting standing in *Massachusetts*, including a procedural right conferred in the Clean Air Act (CAA) to challenge the EPA's decision to reject the plaintiffs' rulemaking petition.[88] To support its conclusion that Massachusetts had the right to sue, the Court relied upon statutory language in the CAA to conclude that Congress had required the EPA to use the federal government's sovereign powers to protect states, among others, from vehicle emissions, "'which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"[89] Additionally, the *Massachusetts* decision observed that Congress has "recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious."[90] Combining these justifications for standing with the *parens patriae* doctrine, Justice Stevens concluded, "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."[91] A serious problem with the *Massachusetts* decision is that it did not clearly delineate to what extent the Court's recognition of special state standing rights resulted from the *parens patriae* doctrine as opposed to either statutory rights in the CAA or the special standing rights of plaintiffs seeking to vindicate procedural rights.[92]

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85. *Id.* (quoting *Tenn. Copper Co.*, 206 U.S. at 237).
86. *Id.*
87. *Id.* at 519-20.
88. *Id.*
89. *Id.* (quoting 42 U.S.C. § 7521(a)(1) (2006)).
90. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1) (2006)).
91. *Id.*
92. Mank, *States Standing*, *supra* note 1, at 1733-34, 1746-47, 1755-56 (criticizing *Massachusetts* for not clarifying whether and to what extent the special treatment of state

2. *Massachusetts Meets the Tests for Injury, Causation, and Redressability*

While it stated that states are entitled to a more lenient standing test pursuant to the *parens patriae* doctrine, the Court also arguably suggested that the Commonwealth had met the traditional three-part Article III standing test for injury, causation, and redressability.[93] Regarding the injury prong of the standing test, the Court determined that climate change had caused rising sea levels that had already harmed Massachusetts' coastline and posed potentially more severe harms in the future.[94] Rejecting the premise that prudential or constitutional principles bar standing for any plaintiff seeking to challenge a generalized grievance,[95] Justice Stevens stated, "That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."[96] Because Massachusetts "'owns a substantial portion of the state's coastal property,'" the Court concluded that "[the Commonwealth] has alleged a particularized injury in its capacity as a landowner" even if many others have suffered similar injuries.[97]

Addressing the causation prong of the standing test, the Court concluded that the "EPA does not dispute the existence of a causal connection between manmade [GHG] emissions and global warming."[98] In light of the EPA's acknowledgement that man-made GHG emissions cause climate change, the majority opinion determined that "[a]t a minimum, therefore, the EPA's refusal to regulate such emissions 'contribute[d]' to Massachusetts' injuries."[99] Nevertheless, the EPA "maintain[ed] that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the Agency [could not] be haled into federal court to answer for them" since "predicted increases in [GHG] emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease" that might result if the agency regulated GHGs from new vehicles.[100]

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standing in the case resulted from the *parens patriae* doctrine as opposed to the special standing rights of plaintiffs seeking to vindicate procedural rights or other factors).

93. *Massachusetts*, 549 U.S. at 526.

94. *Id.* at 521-23; Mank, *Standing and Future Generations*, *supra* note 1, at 71-73.

95. *See supra* Section II.A (discussing whether prudential standing or constitutional standing principles restrict or prohibit suits alleging generalized grievances).

96. *Massachusetts*, 549 U.S. at 522 ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'" (quoting Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998))).

97. *Id.* (citations omitted).

98. *Id.* at 523.

99. *Id.*

100. *Id.* at 523, 524.

The Court rejected the EPA's causation argument because it "rest[ed] on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[101] Justice Stevens observed that agencies and legislatures "do not generally resolve massive problems in one fell regulatory swoop."[102] He concluded, "That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law."[103] Furthermore, the Court concluded that "reducing domestic automobile emissions is hardly a tentative step" because "the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere . . . more than 1.7 billion metric tons in 1999 alone."[104] Because domestic automobile emissions account for more than 6% of worldwide carbon dioxide emissions, the Court held that "U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming."[105]

Finally, the EPA similarly argued that the plaintiffs could not satisfy the redressability portion of the standing test since federal courts could not remedy the alleged harms to the petitioners from GHGs because most emissions come from other countries.[106] Rejecting the EPA's argument, the Court emphasized that the EPA had a duty to reduce future harms to Massachusetts even if it could not prevent all such harms: "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[107] Responding to the EPA's argument that its regulation of GHG emissions from new vehicles would have little impact because of increasing emissions from developing countries such as China and India, the Court stated: "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[108] Furthermore, the Court suggested that the EPA had a duty to prevent catastrophic harms to future generations: "The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition."[109]

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101. *Id.* at 524.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 524, 525.
106. *Id.* at 517, 523-24.
107. *Id.* at 525.
108. *Id.* at 525-26.
109. *Id.*

Despite its assertion that states enjoy "special solicitude" in deciding standing questions, the *Massachusetts* decision's analysis of injury, traceable causation, and redressability requirements did not provide clear reasons for distinguishing between the standing rights of states and private plaintiffs.[110] For example, a private land owner could suffer similar injuries as the Commonwealth of Massachusetts alleged from rising sea levels. While the Court did mention that the Commonwealth of Massachusetts "'owns a substantial portion of the state's coastal property,'"[111] there is no logical reason pursuant to standing requirements why an injury to a large amount of land should affect standing requirements differently from a similar injury to a small amount of land as long as both injuries are concrete.[112] The traceable causation and redressability issues in climate change cases arising from the fact that most emissions originate from outside the U.S. are arguably similar whether the plaintiffs are states or private parties.[113]

B. Chief Justice Roberts' Dissenting Opinion

In his dissenting opinion, Chief Justice Roberts argued that the global problem of climate change was a nonjusticiable general grievance that should be decided by the political branches rather than the federal courts.[114] He reasoned that it was inappropriate for the Court to apply a more generous standing test for states because there was no basis in the statute, precedent, or logic for such a differentiation.[115] Furthermore, he contended that states do not have greater standing rights under the *parens patriae* doctrine.[116]

1. *The* Parens Patriae *Doctrine Does Not Provide Massachusetts with Greater Standing Rights*

Chief Justice Roberts conceded that *Tennessee Copper* treated states more favorably than private litigants, but he argued that the case did so "solely with respect to available remedies," giving Georgia the right to equitable relief when private litigants could obtain only a legal remedy.[117] He argued that "[t]he case had nothing to do with Article III standing."[118] His point is technically correct because the Court did not develop the modern

110. *Id.* at 520.
111. *Id.* at 522 (citations omitted).
112. *See supra* Subsection I.A.2 and Section I.C.
113. *See infra* Section II.B.
114. *Massachusetts*, 549 U.S. at 535-36 (Roberts, C.J., dissenting).
115. *Id.* at 536-40.
116. *Id.* at 538-39.
117. *Id.* at 537-38.
118. *Id.* at 537.

standing doctrine until the 1940s,[119] but he did not address the implication in the majority opinion that broad standing rights for states would enhance their ability to enforce their quasi-sovereign interest in protecting the health of their citizens or their natural resources.[120]

Applying a narrow interpretation of the *parens patriae* doctrine, Chief Justice Roberts argued that a *parens patriae* suit could in no way lessen a plaintiff state's obligation to prove an injury, because "[a] claim of *parens patriae* standing is distinct from an allegation of direct injury," and "[f]ar from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a 'quasi-sovereign interest' '*apart* from the interests of particular private parties.'"[121] Chief Justice Roberts contended that "a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III" and that "[f]ocusing on Massachusetts' interests as quasi-sovereign makes the required showing here harder, not easier."[122]

Chief Justice Roberts argued that the Court did not explain how its "special solicitude" for Massachusetts affected its standing analysis, "except as an implicit concession that petitioners cannot establish standing on traditional terms."[123] There is some merit to his criticism of the majority opinion because Justice Stevens never clearly explained to what extent the Court used "special solicitude" for Massachusetts' status as a state to change the Court's standing analysis.[124] Chief Justice Roberts asserted that "the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability."[125] He argued that the petitioners failed to prove that a causal connection existed between the alleged injury of loss of coastal land in Massachusetts and the lack of new motor vehicle GHG emission standards because "domestic motor vehicles [only] contribute about 6 percent of global carbon dioxide emissions and 4 percent of global [GHG] emissions."[126] He concluded: "In light of the bit-part domestic new motor vehicle [GHG] emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury—the loss of Massachu-

119. *See supra* Section I.A.

120. *See supra* Section II.A.

121. *Massachusetts*, 549 U.S. at 538.

122. *Id.*

123. *Id.* at 540.

124. *See* Mank, *States Standing*, *supra* note 1, at 1733-34, 1746-47, 1755-56 (criticizing the *Massachusetts* decision for not clarifying whether and to what extent the special treatment of state standing in the case affected the result and how state standing doctrine might impact future cases).

125. *Massachusetts*, 549 U.S. at 540.

126. *Id.* at 544.

setts coastal land—the connection is far too speculative to establish causation."[127]

Furthermore, Chief Justice Roberts argued that "[r]edressability is even more problematic" for the plaintiffs in meeting their burden of proving standing because of the "tenuous link between petitioners' alleged injury and the indeterminate fractional domestic emissions at issue here," as well as the additional problem that the "petitioners cannot meaningfully predict what will come of the 80 percent of [GHG] emissions that originate outside the United States."[128] Chief Justice Roberts rejected the majority's conclusion that "*any* decrease in domestic emissions will 'slow the pace of global emissions increases, no matter what happens elsewhere.'"[129] He argued that the Court's reasoning failed to satisfy the three-part standing test's requirement that a court find that it is "*likely*" that a remedy will redress the "particular injury in fact" at issue in that case.[130] Chief Justice Roberts reasoned that "even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed."[131]

2. *Chief Justice Roberts Argues the Case Is a Nonjusticiable General Grievance Better Suited for Resolution by the Political Branches*

Even granting the plaintiffs' assumption that climate change is a significant policy problem, Chief Justice Roberts in his dissenting opinion argued that it was a nonjusticiable general grievance that should be decided by the political branches rather than by the federal courts.[132] Initially, he asserted that the petitioners' injuries from global warming failed to meet *Lujan*'s requirement that the alleged injury be "particularized" because they were common "to the public at large."[133] Moreover, he contended that the Court's lax application of standing principles in this case failed to consider separation of powers principles, limiting the judiciary to "concrete cases."[134] He argued that the majority's recognition of standing in a case involving policy issues affecting the entire nation and the world at large caused the Court to intrude into policy decisions which are only appropriate for the

127. *Id.* at 544-45.
128. *Id.* at 545.
129. *Id.* at 546.
130. *Id.*
131. *Id.*
132. *Id.* at 535-36, 548-49.
133. *Id.* at 539-41, 543 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 573-74 (1992) (internal quotation marks omitted)).
134. *Id.* at 539-40, 547.

political branches of government.[135] Chief Justice Roberts suggested that the right of citizens to elect representatives to Congress and a President was an adequate answer to any sovereign rights that states had lost when they joined the United States, and, therefore, that there was no need for the Court to recognize liberal *parens patriae* standing rights for states to raise questions of quasi-sovereign interests in the federal courts.[136] Justice Roberts' dissenting opinion argued that only the political branches should decide issues involving generalized harms such as climate change, and, accordingly, opposed the majority's recognition of state standing to bring *parens patriae* suits to effectuate their alleged quasi-sovereign interests in protecting natural resources or citizens against generalized harms.[137] Clearly, Chief Justice Roberts would deny standing in climate change cases to both private and state plaintiffs because of his view that the generalized harms from a global issue should be addressed by the political branches and not Article III courts.

III. *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.*[138]

A. The Plaintiffs' Public Nuisance Action

The *Connecticut v. American Electric Power Co.* suit was filed before the Supreme Court's seminal *Massachusetts* decision in 2007.[139] In 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York alleging that the five defendant electric power companies were committing a public nuisance by operating fossil-fuel burning electric generating plants in the United States that emitted large amounts of carbon dioxide that significantly contributed to global climate change.[140] Eight states[141] filed the first complaint ("states plaintiffs"), and three nonprofit land trusts[142] filed the second complaint ("land trust plaintiffs").[143] The de-

135. *Id.* at 535-36, 548-49.

136. *See id.* at 535-36, 548-49 (arguing that the majority usurped the authority of political branches by unduly expanding standing rights of states).

137. Mank, *Standing and Future Generations*, *supra* note 1, at 76.

138. The discussion of *Connecticut v. American Electric Power Co.* is based upon my prior article, Mank, *Tea Leaves*, *supra* note 1.

139. *See* Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

140. *Id.* at 2533-34.

141. California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, although New Jersey and Wisconsin withdrew by the time the case came before the Supreme Court. *Id.* at 2533-34 n.3.

142. *Id.* at 2534 n.4.

143. Connecticut v. Am. Electric Power Co., 406 F. Supp. 2d 265, 267-68 & nn.2-3 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309, 393 (2nd Cir. 2009), *rev'd and remanded*, 131 S. Ct. at 2527, 2540 (2011).

fendants were four private companies,[144] along with the Tennessee Valley Authority (TVA), "a federally owned corporation that operates fossil-fuel fired power plants in several States."[145] "According to the complaints, the defendants 'are the five largest emitters of carbon dioxide in the United States.'"[146] Annually, the five utilities collectively emitted 650 million tons of carbon dioxide, which constituted "25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, and 2.5 percent of all anthropogenic emissions worldwide."[147]

In their complaints, the plaintiffs asserted that the defendants' carbon-dioxide emissions worsened global climate change and thereby "created a 'substantial and unreasonable interference with public rights,' in violation of [either] the federal common law of interstate nuisance, or, in the alternative, of state tort law."[148] The states plaintiffs alleged that their "public lands, infrastructure, and [the health of their citizens] were at risk from climate change."[149] The land trust plaintiffs alleged that "climate change would destroy habitats for animals and rare species of trees and plants on land the trusts owned and conserved."[150] Both the states plaintiffs and land trust plaintiffs each "sought injunctive relief requiring each defendant to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade."[151] As is discussed in Section VI.C, *AEP* would have presented even more interesting judicial issues if the land trust plaintiffs had sought a conflicting remedy different from the states, but the lawyers involved avoided difficult questions by seeking the same remedy.[152]

144. (1) American Electric Power Company, Inc. (and a wholly owned subsidiary); (2) Southern Company; (3) Xcel Energy, Inc.; and (4) Cinergy Corporation, which is now merged into Duke Energy Corporation. *See Am. Electric Power Co.*, 131 S. Ct. at 2534 n.5; *Duke Energy, Cinergy Complete Merger*, (Duke Energy press release April 3, 2006) (announcing merger between Duke Energy and Cinergy), available at http://www.duke-energy.com/news/releases/2006/apr/2006040301.asp.

145. *Id.* at 2534.

146. *Id.* (quoting J.A. at 57, 118).

147. *Id.* (citations omitted).

148. *Id.* (quoting J.A. at 103-05, 145-47).

149. *Id.* (citing J.A. at 88-93).

150. *Id.* (citing J.A. at 139-45).

151. *Id.* (quoting J.A. at 110, 153).

152. *See id.*; *infra* Section VI.C.

B. The District Court Invokes the Political Question Doctrine

In 2005, the District Court for the Southern District of New York dismissed both suits as presenting non-justiciable political questions.[153] Invoking separation of powers concerns, Judge Preska concluded that the complex issue relating to whether and how to reduce carbon dioxide emissions from fossil-fuel burning power plants was a political question for resolution by the political branches and, therefore, not appropriate for judicial decision.[154] Relying upon the six factor test in *Baker v. Carr* for determining what is a non-justiciable political question,[155] the district court concluded that a public nuisance suit seeking to reduce carbon dioxide emissions from numerous electric power plants presented a non-justiciable political question because of "'the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion.'"[156] The court determined that the "identification and balancing of economic, environmental, foreign policy, and national security interests" is a policy determination properly suited for resolution by the political branches and, therefore, dismissed the plaintiffs' complaints.[157]

C. The Second Circuit Reverses and Allows an "Ordinary Tort Suit" to Proceed

The U.S. Court of Appeals for the Second Circuit reversed the decision of the district court.[158] The case was unusual in that it was argued in

153. Connecticut v. Am. Electric Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309, 393 (2nd Cir. 2009), *rev'd and remanded on other grounds*, 131 S. Ct. 2527, 2540 (2011).

154. *Am. Electric Power Co.*, 406 F. Supp. 2d at 274.

155. 369 U.S. 186, 217 (1962) (establishing a six-factor test for when cases should be dismissed by courts because the case involves political questions).

156. *Am. Electric Power Co.*, 406 F. Supp. 2d at 272 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2003)). The court explained that the plaintiffs' prayer for relief, requiring reductions of carbon dioxide from the plants over several years, was non-justiciable because making a decision would:

> require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an "initial policy determination" having been made by the elected branches.

Id. at 272-73.

157. *Id.* at 274 (quoting *Vieth*, 541 U.S. at 278).

158. *Am. Electric Power Co.*, 582 F.3d at 315.

2006, but was not decided until 2009.[159] The long delay was likely caused in part by the Second Circuit's postponement of its decision until the Supreme Court decided *Massachusetts*, which the Second Circuit extensively discussed in its *AEP* decision.[160] Additionally, Judge Sonia Sotomayor was a member of the original three-judge panel of the Second Circuit until she was elevated to the Supreme Court on August 8, 2009.[161] The two remaining members of the panel decided the case on September 21, 2009, pursuant to a Second Circuit rule on that subject.[162]

Addressing the threshold jurisdiction questions, the court of appeals held that the suits were not barred by the political question doctrine[163] and that all the plaintiffs' complaints met the Article III standing requirements.[164] The Second Circuit rejected the district court and defendants' view that the complex issues involved in the case made it a non-judiciable political question. The court stated that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century."[165] Crucially, the Second Circuit characterized the plaintiffs' suit as "an ordinary tort suit" suitable for judicial resolution.[166] The court of appeals acknowledged that Congress by legislation or the Executive Branch by appropriate regulations might in the future regulate power plant emissions of carbon dioxide and thereby displace the role of the judiciary under federal common law, but the court concluded that the political question doctrine did not bar the plaintiffs' suit because it was similar in its essential nature to other public nuisance cases that courts had handled in the past, even if climate change was a new issue.[167] The Second Circuit's discussion of standing will be examined in Section D below.[168]

Assessing the merits of the case, the Second Circuit held that all the plaintiffs had stated a claim pursuant to "the federal common law of nuisance."[169] The court of appeals relied on a series of Supreme Court decisions holding that states may maintain suits to abate air and water pollution produced by other states or by out-of-state industry.[170] Since the EPA had not yet promulgated any rule regulating GHGs when it decided the *AEP* case,

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159. *Id.* at 310.
160. *Id. passim.*
161. *Id.* at 314 n.*.
162. *Id.* at 310, 314 n.*.
163. *Id.* at 332.
164. *Id.* at 349.
165. *Id.* at 326.
166. *Id.* at 329, 331.
167. *Id.* at 332.
168. *See infra* Section III.D.
169. Am. Electric Power Co., 582 F.3d at 371.
170. *See id.* at 350-51 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 208 (1901)).

the Second Circuit concluded that the Act did not displace the plaintiffs' federal common law cause of action because the court could not "speculate as to whether the hypothetical regulation of [GHGs] under the Clean Air Act would in fact 'speak[] directly' to the '*particular* issue' raised here by Plaintiffs."[171]

D. The Second Circuit's Standing Analysis

The district court's decision "explicitly declined to address Defendants' standing arguments," reasoning in a footnote that "'because the issue of Plaintiffs' standing is so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs' standing.'"[172] Because it reversed the district court's dismissal of the case on political question grounds, the Second Circuit found it necessary to address whether the plaintiffs had standing to sue.[173] The court examined whether the states plaintiffs had *parens patriae* standing and concluded that any uncertainties in *Massachusetts* about the relationship between that standing doctrine and traditional Article III standing were irrelevant because the states plaintiffs met both tests.[174] The Second Circuit also discussed whether the states and land trusts plaintiffs had Article III standing in their proprietary capacity as property owners.[175] The court then applied the three-part Article III standing test for (1) injury, (2) causation and traceability, and (3) redressability.[176]

Regarding the standing test for injury, the Second Circuit concluded that the states plaintiffs had adequately alleged current injury by demonstrating increasing temperatures caused by rising levels of carbon dioxide had reduced the size of the California snowpack and thereby reduced the supply of freshwater in that state.[177] Additionally, similar to the *Massachusetts* decision, the states also reasonably alleged future injury to their coastal lands from rising sea levels caused by climate change, despite the defendants' argument that such injuries were not imminent, because there was

171. *Id.* at 380 (quoting Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237 (1985)).

172. *Id.* at 332 (quoting Connecticut v. Am. Electric Power Co., 406 F. Supp. 2d 265, 271 n.6 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2009), *rev'd and remanded on other grounds*, 131 S. Ct. 2527, 2540 (2011)).

173. *Id.* at 332-47.

174. *Id.* at 334-39. The Second Circuit did not address whether New York City had standing because once the court found that the states plaintiffs had standing it was not necessary to decide the standing of the City since only one plaintiff need have standing for a suit to proceed. *Id.* at 339 n.17 (quoting Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 52 n.2 (2006)).

175. *Id.* at 339-40.

176. *Id.* at 340-49.

177. *Id.* at 341-42.

sufficient scientific evidence that rising sea levels would inevitably harm the states' coastlines and that such a certain injury was imminent even if it might not occur for years.[178] For the same reason, the land trust plaintiffs had adequately proven future harm to their properties from rising sea levels caused by increasing levels of carbon dioxide.[179]

Following the reasoning in *Massachusetts*, the Second Circuit concluded that the defendants' significant contribution as the five largest utility sources of GHGs in the U.S. was sufficient to establish causation and traceable injury for Article III standing, even though a majority of global GHG emissions come from other sources.[180] Furthermore, similar to the *Comer* panel decision's argument that traceable standing causation requires a lower amount of proof than proximate causation on the merits, which is discussed in Section VI.B,[181] the Second Circuit cited two courts of appeals decisions for the principle "that, particularly at the pleadings stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation"; and therefore that the plaintiffs' allegations of harm from the defendants' power plants were sufficient to prove standing causation at this stage of the pleadings.[182]

Regarding the redressability prong of the standing test, the defendants argued that the plaintiffs had failed to demonstrate that their proposed remedy of reducing carbon dioxide emissions from the defendants' power plants was likely to prevent global warming.[183] The Second Circuit concluded that the defendants' redressability arguments were foreclosed by the *Massachusetts* decision.[184] Following the reasoning in *Massachusetts*, the Second Circuit concluded that the plaintiffs had demonstrated that it was likely that a court decision in their favor ordering reductions in carbon dioxide emissions from the defendants' power plants would slow or reduce the pace of global climate change even if it would not stop it entirely.[185]

In light of the *Massachusetts* decision, the Second Circuit's conclusion that the states plaintiffs had standing was understandable given the similarities in the injuries alleged and commonalities in the causation and redressability in both cases.[186] More questionable was the Second Circuit's conclusion that the private land trust plaintiffs had standing since the *Massachu-*

178. *Id.* at 342-44; *see* Massachusetts v. EPA, 549 U.S. 497, 521-23 (2007).

179. Am. Electric Power Co., 582 F.3d at 342-44.

180. *Id.* at 316, 345-47; *see Massachusetts*, 549 U.S. at 523-25.

181. *See infra* Section VI.B.

182. *Am. Electric Power Co.*, 582 F.3d at 345-47 (citing Natural Res. Def. Council v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992); Barbour v. Haley, 471 F.3d 1222, 1226 (11th Cir. 2006)).

183. *Id.* at 348.

184. *Id.* at 348-49 (quoting *Massachusetts*, 549 U.S. at 525-26).

185. *Id.* (quoting *Massachusetts*, 549 U.S. at 525-26).

186. *See supra* Section III.A.

setts decision avoided addressing the standing rights of the private plaintiffs in that case and suggested that the states had greater standing rights than private parties.[187] The Second Circuit arguably should have avoided the controversial issue of standing for the private plaintiffs since the injunctive remedies sought by the states and private land trust plaintiffs were the same.

E. The Supreme Court's Standing Decision in *AEP*

1. *Summary of the Court's Standing Affirmance*

In almost all cases involving a tie vote, the Supreme Court simply announces that "[t]he judgment is affirmed by an equally divided Court."[188] The Supreme Court usually follows that formulaic response because an equally divided vote simply affirms the decision below without setting precedent for other lower courts outside that circuit.[189] In the *AEP* decision, however, the Court took the unusual step of providing some explanation of how it divided on the standing and other jurisdictional questions, although it did not announce the identities of the justices who voted for or against standing.[190] The Court stated:

> The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.[191]

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187. Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit*: American Electric Power v. Connecticut, CATO SUP. CT. REV. 295, 304-05, 311-12, 312 n.79 (Case Research Paper in Legal Studies, Working Paper No. 2011-17, Sept. 2011) (arguing Second Circuit in *AEP* should not have addressed standing of private parties), *available at* http://ssrn.com/abstract=1904541.

188. *See, e.g.*, Flores-Villar v. United States, 131 S. Ct. 2312, 2313 (2011) (per curiam).

189. Lyle Denniston, *Opinion Analysis: Warming an EPA Worry, at First*, SCOTUSBLOG (June 20, 2011, 1:31 PM), http://www.scotusblog.com/2011/06/opinion-analysis-warming-an-epa-worry-at-first ("Because the Court split 4-4 on the right to sue issue, that part of the Second Circuit decision was left intact, but without setting a nationwide precedent."); Michael B. Gerrard, *'American Electric Power' Leaves Open Many Questions for Climate Litigation*, N.Y. L.J., July 14, 2011 (stating that the standing portion of the *AEP* case "did not set precedent in the technical sense"), *available at* http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NewYorkLawJournal_Gerrard_7.14.11.pdf.

190. Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011).

191. *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 520-26, 534-35 (2007); Nye v. United States, 313 U.S. 33, 44 (1941)).

While technically not binding as a decision for the lower courts outside the Second Circuit, the *AEP* decision's four to four affirmance of the standing decision provides important clues as to how the Court is likely to rule in future standing cases, at least until the Court's membership changes because of future retirements or appointments to the Court.[192]

2. *Who Were the Four Justices on Each Side of Standing in AEP?*

The voting in the *Massachusetts* decision offers the best guide as to how the eight justices voted in *AEP*. Five justices in the *Massachusetts* decision voted that the Commonwealth had standing under the *parens patriae* doctrine and general Article III standing principles: Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.[193] Three of these justices remained members of the Court when *AEP* was decided; most commentators have assumed that Justices Kennedy, Ginsburg, and Breyer voted in favor of standing in *AEP*, consistent with their endorsement of broad state standing principles in the *Massachusetts* decision.[194]

Four justices dissented in the *Massachusetts* decision; joining Chief Justice Roberts' vigorous dissenting opinion arguing that standing was inappropriate in that case were Justices Scalia, Thomas, and Alito.[195] These four justices remained on the Court at the time of the *AEP* decision.[196] Again, the most logical presumption is that these four justices voted against standing in the *AEP* case as they had in the *Massachusetts* decision.[197]

By the time of the *AEP* decision, Justices Stevens and Souter had retired from the Court and had been replaced by Justices Kagan and Sotomayor, respectively.[198] Justice Elena Kagan was the only member of the Court who voted in *AEP*, but was not a member of the Court when *Massachusetts* was decided.[199] Commentators have assumed that she voted in *AEP* with Justices Kennedy, Ginsburg, and Breyer in part because it was unlikely that any of the dissenting justices in the *Massachusetts* decision changed their minds about standing for the *AEP* decision.[200] Furthermore, in her brief

192. Denniston, *supra* note 189; Gerrard, *supra* note 189.

193. *Massachusetts*, 549 U.S. at 501, 526.

194. Gerrard, *supra* note 189 ("Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are Justices Ginsburg, Stephen Breyer, Elena Kagan, and Anthony Kennedy.").

195. *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting).

196. *See Members of the Supreme Court of the United States*, SUPREME CT. OF THE U.S., http://www.supremecourt.gov/about/members.aspx (last visited Nov. 25, 2012).

197. *See* Gerrard, *supra* note 189 ("The four who disagree [that there is standing in the *AEP* decision] are Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito.").

198. *See Members of the Supreme Court of the United States*, *supra* note 196.

199. *Id.*

200. *Massachusetts*, 549 U.S. at 535-36.

time on the Court, she has generally endorsed a permissive view of standing for plaintiffs[201] and has most often voted with Justices Ginsburg and Breyer.[202] Similarly, based on her permissive view of standing [203] and propensity to vote with the other justices appointed by U.S. presidents who belong to the Democratic Party,[204] it is likely, although not certain, that Justice Sotomayor would vote for state standing in cases similar to *Massachusetts* or *AEP*.[205]

3. *The Impact of AEP on Future Standing Cases*

"Implicitly the *AEP* decision reaffirmed and even expanded [the Court's] standing analysis in *Massachusetts*, which recognized that states have special standing rights when they sue as *parens patriae* to protect their state's natural resources or the health of their citizens."[206] Four justices concluded that at least "some" of the *AEP* plaintiffs met Article III standing requirements in light of *Massachusetts*.[207] The "some plaintiffs" mentioned by the *AEP* decision were probably the states plaintiffs because the *Massachusetts* decision only clearly endorsed standing rights for *states* to bring suits involving climate change.[208]

The *AEP* decision "arguably adopted an even broader standing analysis than *Massachusetts* by eliminating the requirement of a statutory procedural right as a basis for standing."[209] In *AEP*, the private petitioners' brief

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201. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1451-52 (2011) (Kagan, J., dissenting). Justice Sotomayor joined Justice Kagan's dissenting opinion, arguing that taxpayers had standing to challenge Arizona's tuition tax credit. *Id.*

202. During the Supreme Court's 2010–2011 term, Kagan voted with Justices Ginsburg and Breyer in 91% and 85% of all cases, respectively. *See* SCOTUSBLOG, SCOTUSBLOG STAT PACK: OCTOBER TERM 2010, 1 (June 2011), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf.

203. *See, e.g.*, *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1450-55. Justice Sotomayor joined with Justices Ginsburg, Breyer and Kagan-all appointed by Democratic Presidents Clinton or Obama-in a dissenting opinion arguing that taxpayers had standing to challenge Arizona's tuition tax credit. *See id.*; Adler, *supra* note 187, at 313 (articulating that Justice Sotomayor is likely to side with judges with a permissive view of standing).

204. Robert Barnes, *Justices Who Will Shape Supreme Court's Future Pair Up*, WASH. POST, June 29, 2011, at A6-A7; SCOTUSBLOG, *supra* note 202, at 19.

205. Mank, *Tea Leaves*, *supra* note 1, at 593-95; Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1382 (2012), *available at* http://lawdigitalcommons.bc.edu/bclr/vol53/iss4/5.

206. Mank, *Tea Leaves*, *supra* note 1, at 545.

207. Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 & n.6 (2011).

208. *See* Adler, *supra* note 187, at 309-10; Gerrard, *supra* note 189 (suggesting the four justices in *AEP* who stated that at least "some plaintiffs" had standing were most likely referring to the states plaintiffs).

209. *See* Mank, *Tea Leaves*, *supra* note 1, at 545. *See generally supra* Section II.A (discussing *Massachusetts*' requirement of a statutory procedural right as a basis for standing).

had argued that the *AEP* plaintiffs could not meet the Article III constitutional standing test because the broad standing principles in *Massachusetts* were limited to statutory cases.[210] Because four justices concluded that some of the *AEP* plaintiffs had standing, these justices implicitly rejected the argument that *Massachusetts*' broad standing analysis applied in only statutory cases. Thus they appeared willing to extend *Massachusetts*' broad state standing principles beyond its original statutory setting.[211] Accordingly, though it is technically not binding on future decisions, the *AEP* decision might lead to broader standing rights than *Massachusetts*.[212]

The four justices who concluded that at least some of the plaintiffs had Article III standing also observed that "no other threshold obstacle bars review."[213] In footnote six of the *AEP* decision, the Court explained: "In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a 'prudential' bar to the adjudication of generalized grievances, purportedly distinct from Article III's bar."[214] Thus, four justices implicitly rejected the petitioners' argument that the political question doctrine or the prudential standing doctrine barred the plaintiffs' suit because it was a generalized grievance.[215] Implicitly, by concluding that some of the *AEP* plaintiffs had standing and that no other threshold barriers barred their suit, the four justices refused to narrow the reach of the standing analysis in *Massachusetts* and arguably expanded standing rights beyond *Massachusetts*' statutory setting to common law cases.[216]

What remains uncertain is whether a majority of the Court would grant the same standing rights to private plaintiffs in climate change cases as it has for states in *Massachusetts*. It is unclear whether the four justices who voted for standing in *AEP* would support standing for private plaintiffs in a climate change case. During oral argument in *Massachusetts*, Justice Kennedy observed that the *Tennessee Copper* decision, which none of the briefs in the case had addressed, was the "best case" for the plaintiffs, and, therefore, the decision's recognition of special state standing rights under the *parens patriae* doctrine was arguably his idea.[217] Professor Gerrard speculates that when the language in the *AEP* opinion stating that "[f]our members of the Court would hold that at least some plaintiffs have Article

210. *See* Mank, *Tea Leaves*, *supra* note 1, at 596.
211. *See* Adler, *supra* note 187, at 313.
212. *Id.*
213. Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011).
214. *Id.* at 2535 n.6.
215. *See* Mank, *Tea Leaves*, *supra* note 1, at 590, 596-98.
216. *Id.* at 570-82, 597-98.
217. Transcript of Oral Argument at 15, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05–1120); *see also* Mank, *States Standing*, *supra* note 1, at 1738-40 ("It seems most likely that Justice Kennedy suggested that the majority rely on *Tennessee Copper*.").

III standing under *Massachusetts*"[218] is "considered in conjunction with *Massachusetts*," one might infer "that Justice Kennedy believes that only states would have standing. Thus, there might be a 5-4 majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states."[219] While Professor Gerrard's speculation about Justice Kennedy's views on the standing rights of private plaintiffs in climate change suits might be correct, Part VI argues that the Court's standing principles support such suits, at least when private plaintiffs seek individualized damages for plausible concrete injuries from climate change.[220]

IV. *KIVALINA*[221]

A. The District Court Dismisses for Lack of Standing

In *Native Village of Kivalina v. ExxonMobil Corp.*,[222] the Village of Kivalina, whose inhabitants are a self-governing, federally-recognized tribe of Inupiat Eskimos, filed a public nuisance action against several oil, energy, and utility companies for causing substantial GHG emissions that contribute to global warming.[223] They alleged that the defendants' GHG emissions and resulting climate change caused the melting of sea ice that had protected Kivalina from coastal storm waves and surges.[224] They claimed growing storm surges resulting from climate change caused the erosion that was making Kivalina uninhabitable.[225] The plaintiffs alleged that, as a result of the erosion, the Village would have to be relocated at a cost estimated to range from $95 to $400 million.[226] Unlike the *AEP* plaintiffs who sought only injunctive relief, the *Kivalina* plaintiffs sought damages for the cost of relocating the village.[227]

In 2009, the District Court for the Northern District of California dismissed the *Kivalina* case on both political question and standing grounds. The district court concluded that the political question doctrine barred the suit because there were no judicially discoverable and manageable standards

218. *Am. Electric Power Co.*, 131 S. Ct. at 2535.
219. Gerrard, *supra* note 189.
220. *See infra* Part VI.
221. The discussion of the district court's decision in *Kivalina* is substantially based upon a prior article, but I have avoided using quotation marks when recycling material from that prior article to improve the readability of this Article. Mank, *Tea Leaves*, *supra* note 1, at 599-601. The discussion of the Ninth Circuit's decision in *Kivalina* consists of completely new material.
222. 663 F. Supp. 2d 863 (N.D. Cal. 2009).
223. *Id.* at 868-69.
224. *Id.*
225. *Id.* at 869.
226. *Id.*
227. *Id.*

for a public nuisance suit addressing the complexities of global climate change.[228] The court also determined that deciding the case would involve policy questions more appropriately resolved by the political branches of the government.[229] Additionally, the district court concluded that the plaintiffs could not prove standing causation because they could not trace the Village's harms to specific actions of the defendants in emitting GHGs and because any possible connection was too attenuated to support standing.[230] The district court rejected the plaintiffs' assertion that they were entitled to special *parens patriae* standing rights pursuant to the *Massachusetts* decision because "[t]his rationale does not apply to Plaintiffs, which did not surrender its sovereignty as the price for acceding to the Union."[231] Furthermore, the district court concluded:

> Even if the special solitude mentioned in *Massachusetts* applied to Plaintiffs, they still would lack standing. As discussed above, Plaintiffs lack standing on the basis of the political question doctrine and based on their inability to establish causation under Article III. Even a relaxed application of the requisite standing requirements would not overcome these fatal flaws in Plaintiffs' case.[232]

Because it had dismissed all of the federal common law claims, the district court declined supplemental jurisdiction over the remaining state law nuisance claims and, therefore, dismissed the state law claims without prejudice to their presentation in a state court action.[233]

The district court's assertion in *Kivalina* that the plaintiffs could not prove causation *even if* the special standing rights in the *Massachusetts* decision were applicable is inconsistent at least with the reasoning of the four justices who found standing in the subsequent *AEP* decision.[234] The private petitioners in their *AEP* brief made essentially the same argument as the *Kivalina* district court decision in arguing that the plaintiffs could not establish standing causation when the defendants had caused only a tiny fraction of the worldwide GHG emissions contributing to climate change,[235] but four justices in the *AEP* decision concluded that the plaintiffs had met Article III constitutional standing requirements despite similar contrary causation arguments.[236]

Additionally, it remains to be seen whether other courts will accept the reasoning in the district court's *Kivalina* decision that the state standing

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228. *Id.* at 873-77.
229. *Id.*
230. *Id.* at 877-81.
231. *Id.* at 882.
232. *Id.*
233. *Id.* at 882-83.
234. Mank, *Tea Leaves*, *supra* note 1, at 600.
235. *Id.* at 600-01.
236. *Id.* at 601.

doctrine is inapplicable to a federally-recognized tribe.[237] Neither *Massachusetts* nor the *AEP* decision addressed the standing rights of tribes or private plaintiffs.[238] Eventually, the Supreme Court may need to address whether non-state parties, including either tribes or private parties, can file suit for harms caused by globalized problems such as GHG emissions.

Furthermore, the district court's causation analysis in *Kivalina* was flawed because it failed to distinguish between the lower standard for traceable standing causation and the higher standard for proximate causation for a merits determination. As is discussed in Sections V.B, V.D, and VI.B, the three-judge panel in *Comer* appropriately recognized, consistent with Supreme Court precedent, that there is a lower threshold for standing causation than for causation on the merits.[239] The panel correctly concluded that the *Comer* plaintiffs had alleged sufficient facts about the connection between climate change and the possibly amplified impact of Hurricane Katrina to meeting standing requirements, even if one might doubt that they could prove proximate causation by a preponderance of the evidence.[240] Similarly, the district court in *Kivalina* should have recognized that the Village had asserted sufficient facts to establish standing causation, even if the judge doubted the ability of the plaintiffs to prevail on the merits. As is discussed in Section VI.B, courts, in deciding standing causation issues, should simply look for plausible evidence of a causal relationship between the plaintiff's injuries and the defendant's actions, rather than the proof necessary for proximate causation on the merits.[241]

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237. Some lower court decisions and commentators have implicitly or explicitly accepted *parens patriae* standing for Native American Indian tribes. *See* Berrey v. Asarco, Inc., 439 F.3d 636, 640-41 n.1 (10th Cir. 2006) (accepting implicitly Quapaw Tribe's standing as *parens patriae* in suit under both common law and federal statutes against mining company that allegedly caused environmental contamination on tribal lands); Quapaw Tribe of Oklahoma v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1181 (N.D. Okla. 2009) (holding explicitly that tribe has *parens patriae* standing); Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-*Oliphant *Guardian and Dual-Edged Nature of* Parens Patriae, 2010 U. ILL. L. REV. 1119, 1119-20, 1159-62 (supporting *parens patriae* standing for Indian Tribes as means to "restore their inherent sovereignty and finally provide the necessary protection for tribal members"); Elizabeth Ann Kronk, *Effective Access to Justice: Applying the* Parens Patriae *Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LANDS & RESOURCES L. REV. 1, 8-25 (2011) (criticizing Kivalina district court for rejecting *parens patriae* standing for Native Village of Kivalina and supporting *parens patriae* standing for Indian Tribes).

238. *See* Mank, *Tea Leaves*, *supra* note 1, at 601.

239. *See* Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009) (citations omitted), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); *see also* Sections V.B, V.D and VI.B.

240. *Comer*, 585 F.3d at 864-65; *see infra* Section VI.B.

241. *Comer*, 585 F.3d at 864.

B. The Ninth Circuit's Decision in Kivalina

1. *The Panel Majority Holds the CAA Displaces the Plaintiffs' Federal Common Law Claims, but Does Not Address Standing*

After the parties submitted supplemental appellate briefs relating to the Supreme Court's *AEP* decision, a Ninth Circuit panel heard oral argument in *Kivalina* in November 2011.[242] In their appeal to the Ninth Circuit, the *Kivalina* plaintiffs argued that their federal common law claims are not displaced by the Clean Air Act (CAA) because damages claims are inherently different from the injunction claims displaced in *AEP*; however, the defendants argued that all federal common law claims are displaced by the CAA.[243] The *Kivalina* plaintiffs also contended that their state common law nuisance claims were not properly "'before [the Ninth Circuit] because the district court dismissed them without prejudice to re-filing in state court.'"[244]

In 2012, the Ninth Circuit affirmed the district court's dismissal in *Kivalina* on the ground that the CAA displaced the plaintiffs' federal common law public nuisance claims; the panel did not, however, address the standing issues. [245] First, the Ninth Circuit observed that the Supreme Court in *AEP* had clearly held that the CAA displaces federal common law nuisance suits seeking to abate GHG emissions from stationary sources such as electric power plants.[246] Secondly, the Ninth Circuit rejected the plaintiffs' argument that their federal common law suit for damages was fundamentally different from the injunctive suit displaced in *AEP*.[247] The Ninth Circuit concluded that a line of Supreme Court decisions barred all remedies, including damages, if the Court determined that a federal common law cause of action was displaced by a comprehensive statute.[248] The Ninth Circuit agreed with the

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242. Brown & Miksad, *supra* note 26, at 8.

243. *See id*; Appellants' Supplemental Brief on *AEP v. Connecticut* at 3-8, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) (No. 09-17490) [hereinafter Kivalina Supplemental Brief].

244. Kivalina Supplemental Brief, *supra* note 243, at 1 n.2; Brown & Miksad, *supra* note 26, at 8.

245. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012), petition for en banc review denied (9th Cir. Nov. 27, 2012).

246. *Id.* at 856-57.

247. *Id.* at 857.

248. The Ninth Circuit in *Kivalina* stated:

> [T]he Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement. In *Exxon Shipping Co. v. Baker*, Exxon asserted that the Clean Water Act preempted the award of maritime punitive damages. The Supreme Court disagreed, noting that it had "rejected similar attempts to sever remedies from their causes of action." In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, the Supreme Court considered a public nuisance claim of damage to fishing grounds caused by discharges and ocean dumping of sewage. The Court held that the cause of action was dis-

Supreme Court's approach, reasoning: "If a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form."[249] The panel concluded:

> In sum, the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief. The civil conspiracy claim falls with the substantive claim. Therefore, we affirm the judgment of the district court. We need not, and do not, reach any other issue urged by the parties.[250]

2. *Judge Pro's Concurring Opinion Holds the Plaintiffs Lack Standing, but Suggests that Their State Common Law Claims May Be Pursued in State Court*

In his concurring opinion, Judge Pro, a federal district court judge from the District of Nevada sitting by designation, filed a separate opinion, part of which states:

> [T]o address what I view as tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim, and to more fully explain why I concur in the majority opinion's ultimate conclusion. I also write separately to express my view that Kivalina lacks standing.[251]

In a lengthy discussion of the relevant cases, Judge Pro questioned whether all of the Supreme Court's displacement cases had consistently barred both injunctive and damages remedies.[252] Nevertheless, he concluded that "*Milwaukee II*, *Middlesex*, *AEP*, and the comprehensive nature of the CAA lead to the conclusion that Kivalina's federal common law nuisance claim for damages in this case is displaced."[253]

For the purposes of this Article, Judge Pro's complicated argument that the Supreme Court's displacement cases had not consistently barred both injunctive and damages remedies is less important than his discussion of a case in which the Supreme Court had concluded that a federal statute that preempted state injunctive relief did not necessarily bar a state legal

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> placed, including the damage remedy. Thus, under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies.

Id. (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008)) (citing Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).

249. *Id.*

250. *Id.* at 858.

251. *Id.* (Pro, J., concurring).

252. *Id.* at 858-66.

253. *Id.* at 866.

action for damages.[254] In *Silkwood v. Kerr-McGee Corp.*, the Court held that federal law preempted a state law claim for injunctive relief because federal statutes give the federal government exclusive authority for the safety of nuclear facilities; the Court also concluded that federal law did not preempt the plaintiff's state law damages claim.[255] Judge Pro reasoned, "Consequently, *Silkwood* supports the conclusion that the right and the remedy may indeed be severed when the particular claim at issue seeks injunctive relief versus damages."[256]

Even if the Ninth Circuit is correct that the CAA displaces the *Kivalina* plaintiffs' federal common law remedy, Judge Pro's reasoning clearly suggests that they may still seek damages through a state common law action.[257] Judge Pro explicitly observed:

> Displacement of the federal common law does not leave those injured by air pollution without a remedy. Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law. . . . The district court below dismissed Kivalina's state law nuisance claim without prejudice to refiling it in state court, and Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted.[258]

Unlike the panel majority decision, Judge Pro addressed the issue of whether the plaintiffs had standing to sue because he viewed standing as a jurisdictional issue that plaintiffs have the burden of establishing before a court may consider the merits of a case.[259] Judge Pro argued that the plaintiffs had failed to prove traceable standing causation because they had failed to show that the defendant-appellees had caused their specific injuries when many other actors who were not parties to the suit had contributed to the global problem of GHG emissions over hundreds of years, since GHG emissions remain in the Earth's atmosphere for long periods of time.[260] Judge Pro distinguished the facts in *Massachusetts* from those in *Kivalina:*

> It is one thing to hold that a State has standing to pursue a statutory procedural right granted to it by Congress in the CAA to challenge the EPA's failure to regulate greenhouse gas emissions which incrementally may contribute to future global warming. It is quite another to hold that a private party has standing to pick and

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254. *See id.* at 863.

255. *Id.* (discussing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250-51, 256 (1984) (concluding that the federal statute preempted state injunctive remedies, but did not preempt state damage remedies)).

256. *Id.* at 863.

257. *Id.* at 866-67.

258. *Id.* at 866 (citing Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2540 (2011) ("In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.")).

259. *Id.* at 867-69.

260. *Id.* at 868-69.

> choose amongst all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages.[261]

Judge Pro failed to address that four Supreme Court justices in *AEP* would have recognized the right of at least state plaintiffs to have standing to file a non-statutory common law action that in effect "pick[ed] and [chose] amongst all the greenhouse gas emitters throughout history" to seek injunctive relief, although not damages.[262] Furthermore, he did not address whether the Village of Kivalina was a tribal entity that possessed rights akin to states.[263] It is possible that the Supreme Court may agree with Judge Pro that private plaintiffs may not bring common law actions for damages against a selective group of defendants, but his short opinion on standing did not address all of the complexities involving private party GHG suits raised in this Article.[264] His two colleagues implicitly chose not to join his views on standing.[265]

V. *COMER V. MURPHY OIL*

In several decisions involving *Comer v. Murphy Oil*, the District Court for the Southern District of Mississippi and various judges on the U.S. Court of Appeals for the Fifth Circuit have disagreed regarding whether private plaintiffs in global warming litigation have standing to sue.[266] In the most recent *Comer* decision, the District Court for the Southern District of Mississippi reviewed *Massachusetts*, *AEP*, and the district court's decision in *Kivalina*, and held that the private plaintiffs did not have standing to sue,[267] although the plaintiffs have appealed that decision to the Fifth Circuit.[268] Parts V.D and VI.B conclude, however, that a three-judge panel decision of the Fifth Circuit, holding that the plaintiffs had standing because there is a lower threshold for standing causation than for proximate causation on the merits, provided better reasoning than the district court decision denying standing.[269]

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261. *Id.* at 869.

262. *Compare id. with* Section III.E.

263. *See infra* Section IV.A.

264. *See infra* Subsection IV.B.2.

265. *Kivalina*, 696 F.3d at 858 (majority opinion) ("We need not, and do not, reach any other issue urged by the parties.").

266. Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007), *rev'd in part*, 585 F.3d 855, 860 n.2 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc). The case was re-filed in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012); *see infra* Part VI.

267. *Comer*, 839 F. Supp. 2d at 858-62.

268. Brown & Miksad, *supra* note 26, at 1, 9.

269. *See Comer*, 585 F.3d at 864; *see infra* Sections V.B, V.D. and VI.B.

A. Background to the *Comer* Case

In 2005, Ned and Brenda Comer, as well as other plaintiffs, filed suit in the District Court for the Southern District of Mississippi against a group of oil companies alleging that the carbon dioxide and other greenhouse gases emitted from the fossil fuels that they sold increased global warming, and that this warming caused or exacerbated Hurricane Katrina, which damaged their property.[270] Subsequently, the plaintiffs filed a third amended complaint that added claims against several electric utility companies, chemical manufacturers, and coal companies.[271] The third amended complaint asserted several claims seeking compensatory and punitive damages based on Mississippi common law related to the plaintiffs' contentions that the defendants' GHG emissions had exacerbated the harms they allegedly suffered during Hurricane Katrina.[272] The plaintiffs' claims in the third amended complaint included unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment.[273]

In 2007, the district court conducted a hearing concerning the coal companies' motion to dismiss.[274] The court held that the plaintiffs did not have standing to bring the lawsuit "because their injuries were not fairly traceable to the actions of the defendants."[275] The court also held that the plaintiffs' claims were non-justiciable pursuant to the political question doctrine.[276] Because it held that it did not have jurisdiction to hear any of the plaintiffs' claims, the court entered a judgment dismissing the plaintiffs' claims.[277] The plaintiffs appealed the district court's dismissal of their claims.[278]

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270. *Comer*, 839 F. Supp. 2d at 852. The plaintiffs also alleged that a group of insurance companies wrongfully denied insurance coverage. *Id.* This Article will not address the insurance claims.

271. *Id.* at 852.

272. *Id.* at 852-54.

273. *Id.*; *Comer*, 585 F.3d at 859-60; Bradford C. Mank, *Civil Remedies*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 183, 201-04 (Michael B. Gerrard ed., 2007) (discussing allegations in Third Amended Complaint in *Comer*).

274. Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855, 860 n.2 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc).The district court did not issue a written opinion in the case, but instead explained its ruling from the bench. *Id.*

275. *Comer*, 839 F. Supp. 2d at 853 (citation omitted).

276. *Id.*

277. *Id.*

278. *Id.*

B. Three-Judge Panel Recognizes Standing for the Private Plaintiffs

In 2009, a Fifth Circuit panel of three judges reversed in part the district court's dismissal, concluding that the plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims present nonjusticiable political questions.[279] The panel determined, however, that "their unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims must be dismissed for prudential standing reasons."[280] As is discussed in more detail below in Section V.C, the Fifth Circuit granted a rehearing en banc that vacated the panel opinion and judgment.[281] Then, because new circumstances arose that led a judge to disqualify and recuse himself, the Fifth Circuit lost the necessary quorum to hear an en banc appeal and concluded that it could not hear the case, leaving the district court's decision as the final decision in the case.[282] Even though the panel decision was vacated and has no legally binding effect, it certainly is worthwhile to consider how three members of the Fifth Circuit evaluated a private plaintiff's claim of standing in a climate change case.

Because the case was a diversity action involving state common law rights of action, the panel observed that the plaintiffs had to satisfy both state and federal standing requirements.[283] The panel observed that Mississippi's courts have been more permissive than federal courts in granting standing to parties because the state constitution does not limit the judicial power to "Cases" or "Controversies."[284] The panel concluded that the plaintiffs had standing under Mississippi law because they "clearly allege that their interests in their lands and property have been damaged by the adverse effects of defendants' greenhouse gas emissions."[285]

The panel initially observed that federal courts apply "more rigorous" standing requirements than Mississippi courts because of Article III's "Cases" and "Controversies" limitation on the federal judiciary.[286] After reviewing the standing requirements discussed in Part I of this Article, the panel concluded that "the plaintiffs have clearly satisfied the first and third constitutional minimum standing requirements" for their nuisance, trespass, and negligence claims.[287] The panel explained, "These state common-law tort claims, in which plaintiffs allege that they sustained actual, concrete injury

279. *Comer*, 585 F.3d at 860.

280. *Id.*

281. Comer v. Murphy Oil USA, 607 F.3d 1049, 1053 (5th Cir. 2010) (en banc); *see infra* Section V.C.

282. *Comer*, 607 F.3d at 1053-55.

283. *Comer*, 585 F.3d 855 at 861-62.

284. *Id.* at 862.

285. *Id.*

286. *Id.*

287. *Id.* at 863.

in fact to their particular lands and property, can be redressed by the compensatory and punitive damages they seek for those injuries."[288]

The panel observed that the defendants only challenged the second prong of standing—whether the harms alleged by the plaintiffs are fairly traceable to the defendants' actions.[289] The defendants argued that the plaintiffs' theory tracing their injuries from Hurricane Katrina to defendants' actions in selling products containing GHGs was too attenuated to meet the traceable causation prong of standing.[290] The panel, however, rejected the defendant's argument because it "essentially calls upon us to evaluate the merits of plaintiffs' causes of action," and therefore was "misplaced at this threshold standing stage of the litigation."[291]

The panel reasoned that the traceable causation requirement for Article III standing "'need not be as close as the proximate causation needed to succeed on the merits of a tort claim. Rather, an indirect causal relationship will suffice, so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.'"[292] The panel's reasoning that the traceable standing causation requirement may be satisfied with less evidence than is necessary to prove proximate causation on the merits is consistent with the Supreme Court's decision in *Bennett v. Spear*, which stated that the "'proximate cause' of ['plaintiffs'] harm' was not equivalent with the 'injury "fairly traceable" to the defendant' for standing purposes."[293] In *Bennett*, the government defendant argued that the petitioners had to prove proximate causation to prove traceable causation, but the Court rejected that argument by stating that "[t]his wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation."[294] Section VI.B will agree with the panel decision, as well as *Bennett*, and explain why standing

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288. *Id.*

289. *Id.* at 864.

290. *Id.* at 863-64.

291. *Id.* at 864.

292. *Id.* (quoting Toll Bros. v. Twp. of Readington, 555 F.3d 131, 142 (3d Cir. 2009) (internal citations omitted)).

293. *Id.* (quoting Bennett v. Spear, 520 U.S. 154, 168-69 (1997) (internal citations omitted)); *see also* Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 324 (4th Cir. 2002) ("[T]he 'fairly traceable' standard is 'not equivalent to a requirement of tort causation.'" (quoting Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992))); Tozzi v. U.S. Dep't of Health and Human Servs., 271 F.3d 301, 308 (D.C. Cir. 2001) ("[W]e have never applied a 'tort' standard of causation to the question of traceability."); *but see* Meier, *supra* note 9, at 1241, 1245-46, 1297-99 (arguing "the Court should reformulate the causation prong of standing to clarify that standing requires a proximate cause").

294. *Bennett*, 520 U.S. at 168-69; Meier, *supra* note 9, at 1263-64 ("The Court rejected the proximate cause argument of the Service because the plaintiffs had, in the Court's mind, satisfied the cause in fact analysis.").

causation should be treated as separate from proximate causation on the merits.[295]

In light of the procedural status of the case, in which the defendants had filed a motion to dismiss that did not allow them to challenge the factual allegations in the plaintiffs' complaint,[296] the panel concluded, as had the Second Circuit in *AEP*,[297] that the plaintiffs had presented sufficient facts to establish traceable causation for standing at the pleadings stage, even if they might need to allege additional facts to prove their case on the merits at a later time. The panel stated, "Plaintiffs' complaint, relying on scientific reports, alleges a chain of causation between defendants' substantial emissions and plaintiffs' injuries, and while plaintiffs will be required to support these assertions at later stages in the litigation, at this pleading stage we must take these allegations as true."[298] Sections VI.A and VI.B will argue that the panel was correct in distinguishing between the level of proof necessary to establish the preliminary question of standing and the amount of proof needed to succeed on the merits in a public nuisance or other tort claim against defendants for emitting GHGs in a climate change suit.[299]

The panel observed that the defendants' argument that the plaintiffs had failed to prove traceable standing causation was similar to arguments rejected in *Massachusetts*.[300] The panel stated, "Essentially, [the defendants] argue that traceability is lacking because: (1) the causal link between emissions, sea level rise, and Hurricane Katrina is too attenuated, and (2) the defendants' actions are only one of many contributions to greenhouse gas emissions, thereby foreclosing traceability."[301] Yet the *Massachusetts* decision had "accepted as plausible the link between man-made greenhouse gas emissions and global warming."[302] Furthermore, in a footnote, the *Massachusetts* opinion had even suggested that global warming might have exacerbated Hurricane Katrina.[303] The panel reasoned that *Massachusetts* had "accepted a causal chain virtually identical in part to that alleged by [the] plaintiffs [in *Comer*], *viz.*, that defendants' greenhouse gas emissions contributed to warming of the environment, including the ocean's temperature,

295. *See infra* Section VI.B.

296. *Comer*, 585 F.3d at 864; *see also* FED. R. CIV. P. 12.

297. *See* Connecticut v. Am. Electric Power Co., 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd and remanded on other grounds*, 131 S. Ct. 2527, 2540 (2011); *supra* Section III.D.

298. *Comer*, 585 F.3d at 864; *Am. Electric Power*, 582 F.3d at 345-47.

299. *See infra* Sections VI.A-B.

300. *Comer*, 585 F.3d at 865; Massachusetts v. EPA, 549 U.S. 497, 522 (2007).

301. *Id.*

302. *Id.* (citing *Massachusetts*, 549 U.S. at 523).

303. *Id.* at 865 n.4 (citing *Massachusetts*, 549 U.S. at 522 n.18).

which damaged plaintiffs' coastal Mississippi property via sea level rise and the increased intensity of Hurricane Katrina."[304]

Additionally, the panel argued that causation in *Comer* involved one less step than *Massachusetts*, which included the additional causation step of the EPA's failure to regulate GHGs.[305] Because *Comer* had one less causation step than *Massachusetts*, the panel reasoned that "these plaintiffs need no special solicitude" in the standing analysis, in contrast to the special solicitude that the *Massachusetts* decision applied to the standing of the Commonwealth of Massachusetts.[306] Accordingly, the panel concluded that the private plaintiffs in its climate change case could prove standing without the special solicitude granted to states in *Massachusetts*.[307]

Furthermore, the panel rejected the defendants' argument that the plaintiffs could not prove traceable standing causation because the defendants contributed only a small portion of total global GHG emissions, mirroring the *Massachusetts* decision, which rejected the EPA's argument that domestic new vehicle emissions were too small a contribution to global climate change to justify standing causation.[308] The panel explained that the *Massachusetts* opinion had "recognized, in the same context as the instant case, that injuries may be fairly traceable to actions that *contribute* to, rather than solely or materially cause, greenhouse gas emissions and global warming."[309] Additionally, the panel relied on a treatise summarizing standing cases for the principle that the "'fact that the defendant is only one of several persons who caused the harm does not preclude a finding of causation sufficient to support standing.'"[310] The panel then cited cases from several federal courts of appeals, agreeing that a plaintiff can prove traceable standing causation by showing that a defendant probably contributed to the plaintiff's injury without proving the precise harm caused by the defendant's pollutants to the plaintiff.[311] The panel concluded by holding that the allega-

304. *Id.* at 865
305. *Id.* at 865 n.5.
306. *Id.*
307. *Id.*
308. *Id.* at 865-66.
309. *Id.* at 866.
310. *Id.* (quoting 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 101.41[1] (3d ed. 2008) (citing Lac Du Flambeau Band v. Norton, 422 F.3d 490, 500-01 (7th Cir. 2005))).
311. *Id.* at 866-67 ((quoting Save Our Cmty. v. U.S. EPA, 971 F.2d 1155, 1161 (5th Cir. 1992); Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000) (en banc)) (citing Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992); Natural Res. Def. Council, Inc. v. Sw. Marine, Inc., 236 F.3d 985, 995 (9th Cir. 2000); Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 793 (5th Cir. 2000); Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361 (5th Cir. 1996); Pub. Interest Research Grp. of N.J., Inc. v. Powell

tions in the plaintiffs' complaint that the defendants' GHG emissions had resulted in personal injury to the plaintiffs in violation of Mississippi's trespass, private nuisance, public nuisance, and negligence laws had satisfied federal standing requirements, including that of traceable causation.[312]

On the other hand, the panel concluded that the plaintiffs' second set of claims—involving allegations of unjust enrichment, fraudulent misrepresentation, and civil conspiracy—did "not satisfy federal prudential standing requirements" because they involved generalized grievances.[313] The panel stated, "Each of the plaintiffs' second set of claims presents a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public."[314] The panel explained that the plaintiffs' first set of claims alleged particularized injuries causing individualized harms to each plaintiff's property, and, therefore, these allegations met federal standing requirements.[315] By contrast, the second set of claims in the plaintiffs' complaint essentially alleged that the government failed to properly enforce environmental laws, affecting the public at large because of "the defendants' engagement in an allegedly false public marketing campaign and wrongful dissuasion of government regulation."[316] In light of prudential standing doctrine, the panel concluded that the second set of claims in the plaintiffs' complaint alleging fraud by the defendants included generalized grievances inappropriate for judicial decision and better suited for resolution by the political branches, since the "interests at stake involve[d] every purchaser of petrochemicals and the entire American citizenry because the plaintiffs [were] essentially alleging a massive fraud on the political system resulting in the failure of environmental regulators to impose proper costs on the defendants."[317]

In a specially concurring opinion, Judge Davis agreed with the panel opinion that the plaintiffs had satisfied standing requirements and that the case should not be dismissed pursuant to the political question doctrine.[318] As "an alternative basis for dismissal," however, he agreed with the defendants "that the plaintiffs failed to state a claim under common law" because "the plaintiffs failed to allege facts that could establish that the defendant's

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Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990); Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md., 268 F.3d 255, 263-64 (4th Cir. 2001); Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 543 (6th Cir. 2004); Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 148 F.3d 1231, 1247 (11th Cir. 1998))).

312. *See id.* at 860, 867.
313. *Id.* at 867-68.
314. *Id.* at 868.
315. *See id.* at 867-69.
316. *Id.* at 869.
317. *Id.*
318. *Id.* at 880 (Davis, J., concurring).

actions were a proximate cause of the plaintiffs' alleged injuries."[319] Regardless of whether one agrees or disagrees with his conclusion that the plaintiffs failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries, Judge Davis appropriately separated whether the plaintiffs had proved standing causation and the overall standing decision from whether the plaintiffs had proved proximate causation on the merits.[320]

C. The En Banc Fifth Circuit Vacates the Panel Decision

With a bare minimum quorum of nine judges, the Fifth Circuit voted to rehear the *Comer* case en banc.[321] In a footnote, the Fifth Circuit noted that an additional seven members of the court had recused themselves and did not participate in the decision to grant en banc review.[322] According to Rule 35 of the Federal Rules of Appellate Procedure, federal courts of appeals should only grant en banc review in rare circumstances where a decision undermines the unity of the circuit's prior decisions or a case has "exceptional" significance.[323] According to a report by the Federal Bar Council for the Second Circuit:

> [I]n the 11-year period from 2000 through 2010, the twelve regional circuits heard a total of more than 325,000 cases that were terminated on the merits after oral hearings or submissions on briefs. A total of 667 (as reported) to 670 cases (using our Second Circuit data) were heard *en banc* during that same 11-year period—a little over 2/10 of 1% of the total.[324]

The report also observed, "Notably, it appears that one overall trend in the circuit courts is a decline in en banc hearings—in both absolute and relative terms—although the numbers are sufficiently small that it is hard to tell if the trend is truly significant."[325] Thus, the Fifth Circuit's decision to grant en banc review in *Comer* indicated that the Court believed that the case was exceptional or threatened the unity of the Circuit's law on standing, or perhaps both.

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319. *Id.*

320. *See id.*

321. *See* Comer v. Murphy Oil USA, 598 F.3d 208, 210 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

322. *Id.* at 210 n.1.

323. FED. R. APP. P. 35. Rule 35 states: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." *Id.*

324. FED. BAR COUNCIL SECOND CIR. COURTS COMM., *EN BANC* PRACTICES IN THE SECOND CIRCUIT: TIME FOR A CHANGE? 4 (July 2011), *available at* http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

325. *Id.* at 5 (emphasis omitted).

After the Fifth Circuit granted en banc review, the *Comer* case took a bizarre turn. The Fifth Circuit explained:

> After the en banc court was properly constituted, new circumstances arose that caused the disqualification and recusal of one of the nine judges, leaving only eight judges in regular active service, on a court of sixteen judges, who are not disqualified in this en banc case. Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business.[326]

The Fifth Circuit declined to appoint a judge from another circuit court of appeals to allow it to meet its quorum requirements or to waive its quorum rule, and, therefore, the court declared that it had no authority to hear the appeal from the district court.[327] Because Fifth Circuit rules state that a panel decision is vacated as soon as there is a grant of rehearing en banc in the case, the court declared that it could not reinstate the panel decision.[328] Furthermore, the court declined to hold the case in abeyance until a time in the indefinite future when it might have a quorum.[329] The court dismissed the appeal, and thus the decision of the district court stood as the only legitimate judgment in the case.[330]

Judge Davis, who was joined by Judge Stewart, dissented from the order dismissing the appeal; both had served on the three-judge panel whose decision had been vacated.[331] Judge Davis argued that the Fifth Circuit's rule of vacating the panel decision when it grants en banc review made no sense when applied "in this situation where the court, after voting a case en banc, loses its quorum and the en banc court never considers the appeal on its merits."[332] He argued that the court should appoint a judge from another circuit to avoid denying the plaintiffs their right to an appeal.[333]

Judge Dennis, the third member of the three-judge panel whose decision had been vacated by the five-judge majority of the Fifth Circuit deciding the case,[334] filed a separate dissenting opinion.[335] Using stronger language than Judge Davis, Judge Dennis condemned the majority for its "shockingly unwarranted actions of ruling that the panel decision has been

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326. *Comer*, 607 F.3d at 1053-54.

327. *See id.* at 1054-55.

328. *Id.* at 1053-55.

329. *Id.* at 1054.

330. *See id.* at 1055.

331. *Id.* at 1055-56 (Davis, J., dissenting); Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009) (listing Judges Davis and Stewart as members of the three-judge panel), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc).

332. *Comer*, 607 F.3d at 1055.

333. *Id.* at 1056.

334. *Comer*, 585 F.3d at 859 (listing Judge Dennis as member of the three-judge panel).

335. *Comer*, 607 F.3d at 1056-66.

irrevocably vacated and dismissing the appeal without adjudicating its merits."[336] He argued that the court could fulfill its "absolute duty" to hear an appeal in the case by either (1) interpreting its rules to conclude that it had a quorum to hear the case; (2) assigning a judge from another circuit to join the court; or (3) holding the case over until it had a quorum.[337]

The five-judge majority of the eight judges hearing the case noted that the parties had the right to petition the Supreme Court.[338] The plaintiffs chose not to file a petition for a writ of certiorari as to the merits of their appeal, but they instead filed a petition for a writ of mandamus asking the Supreme Court to order the Fifth Circuit to reinstate their appeal.[339] On January 10, 2011, the Supreme Court denied the plaintiffs' petition.[340]

D. The District Court Denies Standing Again

In 2011, the plaintiffs, including Ned Comer as lead plaintiff, filed a new complaint and then an amended complaint against numerous oil companies, coal companies, electric companies, and chemical companies alleging public and private nuisance, trespass, and negligence state law claims against the defendants.[341] They also sought a declaratory judgment that their state law tort claims arising from the defendants' emissions were not preempted by federal law, and they requested that the district court grant them a class designation.[342] As in the previous round of litigation, the plaintiffs alleged that the defendants had harmed their property because the defendants' significant GHG emissions exacerbated global warming which in turn worsened the impact of Hurricane Katrina on the plaintiffs' property.[343] The plaintiffs sought compensatory and punitive damages for the harms allegedly caused by the defendants' conduct.[344]

The defendants filed four separate but similar motions to dismiss the plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[345] The motions addressed several grounds including: (1) res judicata and collateral estoppel; (2) standing; (3) the political question doctrine;

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336. *Id.* at 1056.
337. *Id.* at 1056-66.
338. *Id.* at 1055 (majority opinion).
339. Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 853 (S.D. Miss. 2012).
340. *Id.* (citing In re Ned Comer, 131 S. Ct. 902, 902 (2011)).
341. *Id.* at 853-54. Filed before the *AEP* decision, the plaintiffs' complaint focused on state law claims and avoided federal common law claims. Brown & Miksad, *supra* note 26, at 8.
342. *Comer*, 839 F. Supp. 2d at 854.
343. *Id.*
344. *Id.*
345. *Id.* at 854-55.

(4) preemption; (5) statute of limitations; and (6) proximate causation.[346] This Article will address only the defendants' motion to dismiss for lack of standing.[347]

The district court observed that traceable causation was the only element of standing at issue in the *Comer* case.[348] The *Comer* plaintiffs relied upon a test used in some Clean Water Act (CWA) cases to argue that they need only prove that "the defendants' emissions *contributed* to the kinds of injuries that they suffered."[349] The district court observed that the plaintiffs' "contribution" argument was derived from the Third Circuit's *Powell Duffryn* decision[350] and the Fifth Circuit's partial endorsement of that test depending upon the circumstances in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*[351]

The district court reasoned that the *Powell Duffryn* "contribution" test was inapplicable to global warming cases because the Fifth Circuit in *Crown Central* had already "held that the *Powell Duffryn* test may not be useful in cases where the waterway at issue is very large."[352] In *Crown Central*, the Fifth Circuit had questioned the appropriateness of the contribution test for plaintiffs who "utilized a lake that was eighteen miles downstream from the location of the defendant's discharge."[353] Furthermore, the district court observed that Northern District of California in *Kivalina* had rejected the plaintiffs' proposed use of the *Powell Duffryn* test for contribution in global climate change cases.[354]

While the EPA had found that GHG emissions contribute to global warming in general, the district court in *Comer* concluded that such general causation findings failed to address the requirement that the plaintiffs demonstrate that the *Comer* defendants' emissions worsened Hurricane Katrina and therefore that the damages to the plaintiffs' property from the Hurricane are traceable to the defendants' actions.[355] The district court reasoned that causation in global warming cases was far more complex and required better evidence of causation than the far more simple CWA cases

346. *Id.* at 855-68.

347. *Id.* at 857-62. The other issues are discussed in Brown & Miksad, *supra* note 26, at 8-9.

348. *Comer*, 839 F. Supp. 2d at 858.

349. *Id.* at 859.

350. Pub. Interest Research Grp., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990).

351. *Comer*, 839 F. Supp. 2d at 859 (quoting 95 F.3d 358, 360-61 (5th Cir. 1996)).

352. *Id.* (citing *Crown Central*, 95 F.3d at 361).

353. *Id.* (citing *Crown Central*, 95 F.3d at 361).

354. *See id.* at 860 (discussing Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 877-80 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), petition for en banc review denied (9th Cir. Nov. 27, 2012)).

355. *Id.* at 860-61.

cited by the plaintiffs.[356] Although *Crown Central* involved a motion for summary judgment and *Comer* involved a motion to dismiss where more lenience is applied to the elements of the plaintiffs' allegations, the district court in *Comer* concluded that "the alleged chain of causation in the present case, is by far and away, more tenuous than the causal chain alleged in the *Crown Central*."[357]

Because the *Massachusetts* and *Connecticut* cases applied "'special solicitude'" to the standing rights of states, the district court in *Comer* concluded that neither case supported the private plaintiffs in its case.[358] More questionably, the district court reasoned that the *Massachusetts* decision's finding of contribution in that case did not necessarily mean that the *Comer* plaintiffs could prove contribution.[359] The district court stated:

> Although it is true that the Supreme Court determined that Massachusetts had standing based on the allegation that the EPA's failure to regulate merely contributed to Massachusetts' alleged injuries, this does not mean that the private citizen plaintiffs in the present case can demonstrate the causal connection standard by showing a mere contribution to similar injuries. If contribution were enough, presumably there would have been no need for the Supreme Court to grant Massachusetts special solicitude in its standing analysis.[360]

The *Massachusetts* decision, however, was ambiguous about whether the Commonwealth of Massachusetts needed "special solicitude" to meet the three-part standing test, including causation;[361] it is possible that the Court obscured the issue because the five justices in the majority did not completely agree on whether the Commonwealth met traditional standing requirements.[362] The district court's conclusion that the private plaintiffs' "showing a mere contribution to similar injuries"[363] was not enough to prove a causal connection without the special solicitude given for state standing in *Massachusetts* is debatable because the Supreme Court has not provided a clear answer yet to the question of when private plaintiffs may have standing in global climate change cases.[364]

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356. *Id.* at 861.

357. *Id.*

358. *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007)).

359. *Id.*

360. *Id.*

361. For example, one commentator argues that *Massachusetts* relaxed the injury standing requirement for the Commonwealth because of its status as a state, but not standing causation. *See* Nagle, *supra* note 43, at 496-97. But another commenter said that the Court arguably implied that the Commonwealth had met all three standing requirements, although its language was ambiguous. Mank, *States Standing*, *supra* note 1, at 1730-34.

362. *See* Mank, *States Standing*, *supra* note 1, at 1730, 1733-34 (suggesting *Massachusetts* majority may have obscured standing reasoning because the majority did not agree).

363. *Comer*, 839 F. Supp. 2d at 861.

364. *See* Mank, *States Standing*, *supra* note 1, at 1730, 1733-34.

The district court was arguably on stronger ground when it reasoned that the *Comer* plaintiffs had a more difficult burden in proving traceable standing causation than the state plaintiffs in the *Massachusetts* and *Connecticut* cases because they must demonstrate that:

> [T]he defendants' emissions caused, or according to their arguments, contributed to a specific storm, Hurricane Katrina, and that their injuries would not have occurred if the defendants had not emitted greenhouse gases. . . . [P]laintiffs must show that the defendants' emissions caused or contributed to the specific damages they suffered during Hurricane Katrina.[365]

The court explained:

> [T]he plaintiffs would be required to demonstrate: "(1) what would the strength of Hurricane Katrina have been absent global warming; (2) how much of each Plaintiff's damages would have been attributable to Hurricane Katrina if it had come ashore at a lower strength; and (3) how much of each Plaintiff's damages was attributable to failures by others, such as FEMA and other governmental agencies, to prevent additional injury."[366]

The *Comer* district court was not persuaded by the vacated panel decision to change its views on standing, but the panel decision provided a better analysis by appropriately distinguishing between standing causation and the decision on the merits.[367] The district court should have followed the reasoning of the panel decision that traceable standing causation requires less evidence than proximate causation on the merits.[368] The panel's reasoning that the traceable standing causation requirement may be satisfied with less evidence than is necessary to prove proximate causation on the merits is consistent with the Supreme Court's decision in *Bennett v. Spear*, which stated that "proximate cause" of "[plaintiffs'] harm" is not equivalent with their "injury 'fairly traceable' to the defendant" for standing purposes.[369] Furthermore, the three-judge *Comer* panel decision conclusion that the plaintiffs had proven standing causation is bolstered by a footnote in the *Massachusetts* decision suggesting that Katrina may have been intensified by climate change.[370]

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365. *Comer*, 839 F. Supp. 2d at 861-62.

366. *Id.* at 862 n.9 (quoting Defs.' Mem. Accompanying Mot. to Dismiss).

367. *See supra* Section V.B (discussing panel decision).

368. Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc).

369. *Id.*; Bennett v. Spear, 520 U.S. 154, 168 (1997); *see also* Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 324 (4th Cir. 2002) ("[T]he 'fairly traceable' standard is 'not equivalent to a requirement of tort causation.'" (quoting Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992))); Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 308 (D.C. Cir. 2001) ("[W]e have never applied a 'tort' standard of causation to the question of traceability.")).

370. *Comer*, 585 F.3d at 865-66 & nn.4-5.

The district court inappropriately implied that it dismissed the case for lack of standing at least in part to avoid imposing heavy discovery costs on the defendants in a case the court clearly saw as ultimately futile:

> As this Court stated in the first *Comer* lawsuit, the parties should not be permitted to engage in discovery that will likely cost millions of dollars, when the tenuous nature of the causation alleged is readily apparent at the pleadings stage of the litigation. The Court finds that the plaintiffs have not alleged injuries that are fairly traceable to the defendants' conduct, and thus, the plaintiffs do not have standing to pursue this lawsuit.[371]

The *Comer* plaintiffs have appealed the district court's dismissal to the Fifth Circuit.[372]

This Article contends that the district court should not have considered the potential costs of discovery in deciding to deny standing[373] because federal courts may limit discovery to avoid unnecessary burdens on defendants. For example, Federal Rule of Civil Procedure 26(b)(2)(C)(iii) requires a federal district judge to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit."[374] Citing Rule 26(b), the D.C. Circuit has declared that "once a plaintiff has overcome a standing challenge under our famously liberal pleading rules he is not automatically entitled to unlimited discovery."[375] Additionally, although a court pursuant to Federal Rule of Civil Procedure 56(f) may issue a continuance for discovery where a party opposing a motion for summary judgment claims inability to "'present facts essential to justify its opposition,'" the D.C. Circuit has stated that Rule 56(f) does not "'require a trial judge to countenance repeated abuses of the discovery process or to let discovery go on indefinitely in a groundless suit.'"[376] Moreover, because large U.S. emitters of GHGs are now required in most circumstances by the EPA to monitor and report their emissions, there is little reason for extensive discovery because the basic facts of a defendant's GHG emissions are already public record.[377] The

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371. *Comer*, 839 F. Supp. 2d at 862.

372. Brown & Miksad, *supra* note 26, at 9.

373. *Comer*, 839 F. Supp. 2d at 862.

374. FED. R. CIV. P. 26(b)(2)(C)(iii). Additionally, a federal district court may issue a protective order pursuant to Rule 26(c) limiting or forbidding discovery "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1).

375. Tooley v. Napolitano, 556 F.3d 836, 841 (D.C. Cir.), *dismissed on other grounds on reh'g*, 586 F.3d 1006 (D.C. Cir. 2009).

376. *Id.* (quoting FED. R. CIV. P. 56(d); Donofrio v. Camp, 470 F.2d 428, 431-32 (D.C. Cir.1972)).

377. Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260 (Oct. 30, 2009) (requiring "reporting of greenhouse gas emissions from all sectors of the economy"); *Greenhouse Gas Reporting Program*, EPA.GOV (last updated Oct. 30, 2012), http://www.epa.gov/climatechange/emissions/ghgrulemaking.html (providing access to the latest EPA GHG reporting requirements).

fraud claims by the *Comer* plaintiffs might have required extensive discovery to verify the plaintiffs' allegations, but those claims were dismissed by the three-judge panel for prudential standing reasons because the claims constituted generalized grievances concerning the alleged misleading of numerous public officials.[378] Courts should not distort the standing doctrine to dismiss a case when it is more appropriate to limit discovery.

VI. HOW COURTS SHOULD DECIDE STANDING FOR PRIVATE CLIMATE CHANGE PLAINTIFFS

Because the Supreme Court has explained that standing is a preliminary decision that should be resolved separately from the merits of the case, courts should liberally recognize standing in private climate change cases even if they are likely to rule against the plaintiffs on the merits.[379] Furthermore, as both the three-judge panel in *Comer* and the Supreme Court's *Bennett* decision concluded, there is a lower threshold for standing causation than for proximate causation on the merits.[380] The desire of defendants for an efficient resolution of their case is not an appropriate basis for a court to distort the doctrine of standing even if the judge believes that the plaintiffs will be ultimately unsuccessful on the merits.[381] Because both standing and merits questions in climate change cases are complex, it is better to address standing and the merits separately. Standing issues should be decided first, especially because standing causation issues usually require less evidence since there is a lower threshold for standing causation than for proximate causation on the merits.[382]

This Article proposes, in Sections VI.C and VI.D, criteria for addressing when it is appropriate to recognize standing for private parties filing suits involving climate change challenges.[383] If a state plaintiff has articulated similar claims, the *Massachusetts* decision arguably suggests that suits by sovereign states should enjoy priority over duplicative private claims because states enjoy a unique position in our federalist system of government.[384] That is especially true if the plaintiffs are seeking overlapping or duplicative injunctive relief.[385] On the other hand, if plaintiffs like the Comers have alleged unique injuries that no state plaintiff has asserted, then

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378. Comer v. Murphy Oil USA, 585 F.3d 855, 861, 867-69 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc).

379. *See infra* Sections VI.A-B.

380. *See* Bennett v. Spear, 520 U.S. 154, 168-69 (1997); *Comer*, 585 F.3d at 864; *infra* Section VI.B.

381. *See Comer*, 585 F.3d at 864.

382. *See id.*; *infra* Section VI.B.

383. *See infra* Sections VI.C-D.

384. *See infra* Section VI.C.

385. *See infra* Section VI.C.

standing is presumptively appropriate, especially if the plaintiff is seeking individualized damages in a state common law nuisance action.[386] The proposed approach by this Article suggests that the private plaintiffs in the *AEP* decision were not entitled to standing because they sought duplicative injunctive relief also sought by state plaintiffs, but that the *Comer* plaintiffs should be able to prove standing at least for any plausible state common law damage claims.[387]

A. Courts Should Treat Standing Issues Separately from the Merits

It is important to distinguish between the analysis of whether private plaintiffs in climate change cases should be entitled to Article III standing and whether they should prevail on the merits. Courts should apply a relatively liberal approach in deciding standing issues for private plaintiffs pursuing climate change suits even if courts conclude that it is inappropriate to grant relief on the merits to those same plaintiffs because standing is a preliminary question that should be treated separately from decisions on the merits.[388] The desire of defendants for an efficient resolution of their case is not an appropriate basis for a court to distort the doctrine of standing. This is true even if the judge believes that the plaintiffs will be ultimately unsuccessful on the merits, because it is usually better for the judiciary to decide the three-part test for standing before deciding the merits of the case, which involve different judicial tests.[389]

A full discussion of whether courts should grant relief on the merits in climate change cases is beyond the scope of this Article. In some circumstances, the *Restatement (Third) of Torts* allows plaintiffs to sue multiple tortfeasors jointly and severally if the harm is single and indivisible.[390] Even if the harm of GHGs and climate change is conceived as a single and indivisible harm, however, there are serious problems with climate change suits because most potential defendants cannot be sued in U.S. courts.[391] Some scholars argue that climate change tort suits are the only means to achieve just compensation for those harmed by climate change even if tort law must expand or change beyond its traditional boundaries.[392] By contrast, other

386. *See infra* Section VI.D.

387. *See infra* Section VI.D.

388. *See infra* Section VI.A.

389. *See infra* Sections VI.A-B.

390. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A18 (2000); Carrie Scrufari, *Down the Rabbit-Hole of Standing: Injury, Traceability, and Redress in Greenhouse Gas Litigation*, 3 CHARLOTTE L. REV. 95, 119-20 (2011).

391. *See* Scrufari, *supra* note 390, at 120-21.

392. *See, e.g.*, Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197 (2010); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1 (2011).

commentators argue that climate change suits involve too many parties to be practicable for judicial resolution or expand tort or public nuisance liability too far beyond traditional common law boundaries.[393] On the other hand, Benjamin Ewing and Douglas A. Kysar acknowledge that climate suits are novel tort actions, but argue that federal courts should allow such suits because these actions can act as "prods and pleas" to encourage the political branches to address important social issues that they might otherwise avoid confronting.[394] It is understandable that a federal judge might wish to avoid the complex merit issues involved in a climate suit by dismissing a case for lack of standing or based on the political question doctrine, but courts should strictly separate standing issues from the merits to avoid mischaracterizing standing law as a means to avoid merit questions.

Because standing is a preliminary question that should be treated separately from decisions on the merits, federal courts should avoid using dismissals based on standing as a subterfuge to avoid difficult merit questions. In the seminal 1970 standing case, *Association of Data Processing Service Organizations, Inc. v. Camp*, the Supreme Court recognized that standing is a preliminary issue that courts should separate from whether a plaintiff is likely to succeed on the merits.[395] Prior to the *Data Processing* decision, the Court in *Tennessee Electric Power Co. v. Tennessee Valley Authority*[396] had denied plaintiffs standing to sue "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[397] Thus, the legal interest test somewhat confusingly combined both common law and statutory bases for suit.[398] Before the *Data Processing* decision, federal courts often engaged in lengthy analysis of statutory provisions to determine

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393. *See generally* Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 YALE L.J. ONLINE 317 (2011), http://yalelawjournal.org/2011/12/06/epstein.html; Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. (forthcoming 2012), *available at* http://digitalcommons.law.umaryland.edu/fac_pubs/1194/; Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. (2011), *available at* http://www.law.harvard.edu/programs/about/privatelaw/is.pub.nuisance.tort.merrill.pdf.

394. *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011). *But see* Epstein, *supra* note 393.

395. 397 U.S. 150, 151-53 (1970); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 74 (1984) (arguing *Data Processing* separated standing from merits).

396. 306 U. S. 118 (1939).

397. *Id.* at 137-38.

398. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 226-27 (1988); Peter M. Seka, Note, *Federal Jurisdiction—The Second Circuit's Competitive Advocate Standing Theory: Public or Private Model Theory? A Call for Choice*, 14 W. NEW ENG. L. REV. 185, 191-92 (1992).

if a plaintiff met the legal interest standing test, especially in cases where the plaintiff was alleging competitive injury in violation of a federal statute and there was no obvious common law basis for a lawsuit.[399]

The Court in *Data Processing* rejected prior cases requiring plaintiffs to demonstrate a "legal interest" because the "test goes to the merits."[400] The *Data Processing* decision sharply distinguished between the preliminary question of standing and the ultimate decision on the merits, stating that "[t]he question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[401] As an example, the *Data Processing* opinion cited "the Administrative Procedure Act grant[ing] standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'"[402] The *Data Processing* decision concluded that the plaintiffs had standing to sue while leaving it to the lower courts to decide whether they could prevail on the merits.[403] The *Data Processing* opinion clearly established the principle that standing is a separate question from the merits.[404]

Subsequent Supreme Court decisions have similarly distinguished between the threshold issue of standing and decisions on the merits.[405] In *Bennett*, the Court distinguished between standing causation "injury 'fairly traceable' to the defendant" and "injury as to which the defendant's actions are the very last step in the chain of causation."[406] Accordingly, federal courts are bound by precedent to decide whether climate change plaintiffs have standing before deciding whether they can prevail on the merits. Analogously, because a court deciding a motion to dismiss "'must assume all the allegations of the complaint are true'" and "'must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged,'"[407] the Supreme Court in *Bell Atlantic Corp. v. Twombly* distinguished between the

399. *See* Sanford A. Church, Note, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447, 449-50 (1983).

400. *Data Processing*, 397 U.S. at 153.

401. *Id.*

402. *Id.* at 153-54 (quoting 5 U.S.C. § 702 (2006)).

403. *Id.* at 158 ("We hold that petitioners have standing to sue and that the case should be remanded for a hearing on the merits.").

404. *Id.* at 152-54, 158.

405. Warth v. Seldin, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ."); Meier, *supra* note 9, at 1267 ("The Court has consistently reiterated that standing is a determination that is separate from the merits of a dispute . . . .").

406. Bennett v. Spear, 520 U.S. 154, 168-69 (1997).

407. Tooley v. Napolitano, 556 F.3d 836, 839 (D.C. Cir.) (quoting Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc., 525 F.3d 8, 17 (D.C. Cir. 2008)), *dismissed on other grounds on reh'g*, 586 F.3d 1006 (D.C. Cir. 2009).

pleadings stage and the merits when it stated that a court should deny a motion to dismiss if a plaintiff presents "'plausible'" allegations, "'even if it strikes a savvy judge that . . . recovery is very remote and unlikely.'"[408]

Similarly, in *Steel Co. v. Citizens for a Better Environment*, the Supreme Court rejected the doctrine of "hypothetical jurisdiction" employed by some lower courts in which they "assumed" that they had jurisdiction so that they could decide the merits without having to decide standing or other jurisdictional issues.[409] The Court stated, "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."[410] If a court decides the merits without deciding jurisdiction, the Court reasoned that such a decision can be criticized as merely an advisory decision because it is uncertain whether the court has the jurisdiction and hence the authority to render a binding judgment.[411] Following the logic of *Steel Co.*, a court should decide whether it has jurisdiction *before* it decides the merits of a case because a court should not even consider the merits until it is sure that it has the jurisdiction and hence the authority to decide the merits.[412]

B. Traceable Standing Causation Is Less than Proximate Causation

The *Comer* panel reasoned that the traceable causation requirement for Article III standing "'need not be as close as the proximate causation needed to succeed on the merits of a tort claim. Rather, an indirect causal relationship will suffice, so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.'"[413] The panel's reasoning that the traceable standing causation requirement may be satisfied with less evidence than is necessary to prove proximate causation on the merits follows the Supreme Court's precedent in *Bennett*, which stated that the "'proximate cause'" of "[plaintiffs'] 'harm'"

408. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

409. 523 U.S. 83, 93-102 (1998).

410. *Id.* at 94.

411. *Id.* at 101-02.

412. *See id.* at 93-102; Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 85-87 (2d Cir. 2006) (reasoning in light of *Steel Co.* that a district court should not make a "definitive ruling on the merits" without first deciding whether it has Article III standing); Massachusetts v. EPA, 415 F.3d 50, 59-60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment) (arguing based on *Steel Co.* that the court must decide jurisdiction before proceeding to merits of case), *rev'd on other grounds*, 549 U.S. 497 (2007); Meier, *supra* note 9, at 1267-69 (arguing that "standing must be decided at the outset of litigation").

413. Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009) (quoting Toll Bros. v. Twp. of Readington, 555 F.3d 131, 142 (3d Cir. 2009)), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc).

is not equivalent with the "'injury "fairly traceable" to the defendant'" for standing purposes.[414] In *Bennett*, the government defendant argued that the petitioners had to prove proximate causation to prove traceable causation, but the Court rejected that argument by stating, "This wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation."[415]

Standing causation should be treated as separate from tort causation on the merits. Analogously, in common law tort cases, courts distinguish between two different types of causation:[416] first, the trier of fact decides if there is a preliminary cause in fact relationship between a defendant's conduct and the plaintiff's alleged harm, which establishes a factual cause of harm that is necessary but not sufficient to prove legal liability,[417] and, second, the court makes an ultimate proximate causation legal determination as to whether the factual relationship is sufficient to impose legal liability.[418] Professor Sperino observes that there are four concerns with how courts make proximate cause decisions that raise questions about whether such principles should be applied to areas other than tort liability, such as federal statutory interpretation issues involving causation: first, courts have applied conflicting rationales in deciding proximate causation issues; second, courts' proximate causation decisions are ultimately normative judgments about liability limits rather than decisions that turn on whether a defendant is the factual cause of an injury; third, "the goals of proximate cause have evolved over time and are still evolving" as social and judicial values change; and, fourth, courts apply different proximate causation judgments in

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414. *Id.* (quoting Bennett v. Spear, 520 U.S. 154, 168-69 (1997) (internal citations omitted)); *see also* Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 324 (4th Cir. 2002) ("[T]he 'fairly traceable' standard is 'not equivalent to a requirement of tort causation.'" (quoting Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992)); Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 308 (D.C. Cir. 2001) ("[W]e have never applied a 'tort' standard of causation to the question of traceability."). *But see* Meier, *supra* note 9, at 1245-46, 1297-99 (arguing that "the Court should reformulate the causation prong of standing to clarify that standing requires a proximate cause, rather than a cause in fact, analysis" so that standing law can serve a gatekeeping function).

415. *Bennett*, 520 U.S. at 168-69; Meier, *supra* note 9, at 1263-64 ("The Court rejected the proximate cause argument of the Service because the plaintiffs had, in the Court's mind, satisfied the cause in fact analysis . . . .").

416. While the distinction in common law between cause-in-fact and proximate causation is genuine, one must acknowledge that courts have frequently failed to maintain clear distinctions between these two concepts. *See* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 945 (2001); Sandra Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. (forthcoming 2013).

417. "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010).

418. Sperino, *supra* note 416.

intentional tort cases than they do in non-intentional cases, so one must be careful not to apply, for instance, a proximate cause approach suited to negligence issues to an intentional tort situation.[419] Accordingly, there is a good argument that proximate causation is a vague standard that involves too much discretionary judgment by a judge regarding whether it is equitable for courts to impose liability on a defendant in a particular case and, therefore, that courts in making standing decisions should simply examine whether there is a plausible cause-in-fact relationship between the plaintiff's alleged injuries and the defendant's actions.[420] Even Professor Meier, who advocates that federal courts use proximate causation as a standing test to serve a "gatekeeping function,"[421] acknowledges that there are conflicting views on how to define proximate causation:

> There are a multitude of tests for determining whether proximate cause exists, with most jurisdictions having now settled on either the foreseeability test or the scope of the risk test. Complicating matters even further is that often the same term has been used to refer to *both* the cause in fact and proximate cause concepts.[422]

Professor Meier argues that standing causation should be decided on the basis of a proximate causation analysis imported from tort law.[423] He contends that "proximate causation" analysis on the merits requires less intensive fact finding than the separate tort element of "cause in fact" analysis, which he argues that the Supreme Court has often implicitly used in past standing cases.[424] Anticipating the objection that his proposed proximate cause standing test "would be inconsistent with the idea that the standing analysis can be conducted as separate from the merits of the case," Professor Meier argues that the Court's current cause in fact approach sometimes

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419. *Id.*

420. *See* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1544 (2008) (arguing that proximate cause is "an intellectual quagmire" and that it should not be imported into an Article III standing analysis because it would allow a court to inject its belief about what is "fair or not fair"). *See generally* Sperino, *supra* note 416 ("Defining proximate cause is notoriously tricky. . . . [T]he underlying goals of proximate cause are multiple, contested, and evolving. The use of proximate cause varies across tort actions, and many of proximate cause's underlying concerns relate to policy concerns.").

421. *See* Meier, *supra* note 9, at 1245, 1265-69, 1278-82.

422. *Id.* at 1252 (citations omitted). Professor Meier proposes that federal courts use "foreseeability analysis" as a "new interpretation of the fairly traceable prong of standing." *Id.* at 1278-79.

423. *Id.* at 1245, 1297-99.

424. *See id.* at 1245-46, 1252-53, 1259-60, 1297-99. In tort law, "cause in fact" and "proximate cause" are treated as separate elements of a standard negligence cause of action, although Professor Meier concedes that "tort law has been much less successful, however, in coalescing around an established vocabulary for the concepts involved." *See id.* at 1244, 1251; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. a (2010) (explaining that cause in fact and proximate cause address "two quite distinct concepts" despite their common "causal terminology").

addresses the merits of the case.[425] However, if it is true, as Professor Meier claims, that federal courts sometimes inappropriately look to the merits when deciding standing issues, this Article's approach would better solve the problem by clearly establishing that standing causation is a preliminary decision separate from the merits than Professor Meier's proposal to merge standing and the merits into one decision. He acknowledges that "[s]ome reconfiguring of standing doctrine would be needed to avoid repetitive and duplicate analyses" between standing causation and merits causation,[426] but this Article's approach would avoid the need for such reconfiguring by keeping standing and merit causation totally separate. He makes a good point in observing that "the Court could not have picked a more ambivalent phrase than 'fairly traceable' in terms of obscuring the two different types of analyses that are commonly associated with the term 'causation.'"[427] This Article agrees with Professor Meier that the term "fairly traceable" standing causation needs to be clarified, but rejects importing proximate causation terminology to do so.

Professor Meier also suggests that his proximate causation standing proposal would serve a "limited purpose" within the broader context of separation of powers concerns that ask "whether the body that created the substantive law relied on by the plaintiff (usually a state legislature or Congress) intended for the law to be used in the manner that the plaintiff seeks to use it."[428] But, he also acknowledges that "[t]he proximate cause understanding could not, however, further *all* of the separation of powers concepts represented by standing law."[429] Because of the complexities of both the separation of powers and proximate cause doctrines, it is not clear how he would meld the two concepts into an operational standing test.[430] To the contrary, because they are courts of limited jurisdiction limited by the "'Cases'" and "'Controversies'" requirement in Article III, federal courts should not even consider the merits until it is clear that the plaintiff has standing, as the Court held in *Steel Co.* when it rejected the doctrine of hypothetical jurisdiction.[431]

By contrast to Professor Meier's proposed proximate causation standing test, this Article proposes, in accord with the panel decision in *Comer*, treating all standing causation issues as preliminary questions that require only plausible evidence of a link between the defendant's conduct and the

425. Meier, *supra* note 9, at 1298.
426. *Id.*
427. *Id.* at 1253.
428. *Id.* at 1298.
429. *Id.*
430. *See id.* at 1298-99.
431. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 98, 102 (1998) (quoting U.S. CONST. art. III, § 2).

alleged harm to the plaintiff, instead of the more intensive factual and causal analysis required for the merits of the case. Professor Meier acknowledges that the Court continues to employ cause in fact language in its standing opinions because of "a desire to completely divorce the causation inquiry from the merits of the case."[432] Furthermore, he concedes that the Court often "dodge[s] the difficulties that arise in conducting this fact-intensive analysis at the outset of litigation by employing various techniques that essentially emasculate the cause in fact analysis."[433] Thus, the proposed approach of this Article to limit the scope of the analysis in determining standing causation and to explicitly divorce standing causation and the merits is consistent with the Court's actual practice, whereas Professor Meier's proximate causation proposal would require more of a change in its existing approach, requiring a more in-depth analysis of causation than it typically employs.[434] For example, Professor Meier points out that the Court in *Massachusetts* avoided in-depth analysis of standing causation by reasoning that the EPA had stipulated that GHGs cause climate change and that this pattern of avoidance "clearly reflects a hesitancy to engage in a full-fledged cause in fact analysis as part of the threshold inquiry of standing."[435] This Article's proposal for a limited standing causation inquiry is consistent with *Massachusetts*'s "hesitancy" to engage in the intensive gatekeeping causation analysis that Professor Meier prefers.[436]

As opposed to Professor Meier's approach of importing tort concepts such as proximate causation into standing causation,[437] this Article would clarify the Court's existing approach to standing causation by explicitly treating the traceable causation test as a separate and preliminary test distinct from determining tort causation on the merits, because courts should not duplicate causation analysis on the merits when they make the preliminary decision to decide standing.[438] For example, a court might determine that the *Comer* plaintiffs' allegations of a link between the GHG emissions of the numerous defendants and the potential exacerbation of Hurricane Katrina from such GHG emissions presented a plausible theory sufficient to prove standing causation while waiting until the merit stage to decide if the plaintiffs can prove by a preponderance of the evidence that it is more likely

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432. Meier, *supra* note 9, at 1286-87.

433. *Id.* at 1287; *see also id.* at 1287-96.

434. *See generally id.* at 1286-96 (discussing the Court's avowed cause in fact standing test and how it avoids engaging in meaningful factual analysis).

435. *Id.* at 1296-97.

436. *Id.* at 1296-99 (proposing that federal courts use proximate causation as gatekeeping test to limit Article III jurisdiction).

437. *Id.* at 1297.

438. Comer v. Murphy Oil USA, 585 F.3d 855, 864-65 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2009); *see supra see supra* notes 405-19 and accompanying text.

than not that the defendants' actions worsened the impact of the Hurricane.[439] Professor Meier argues that federal courts should serve as "gatekeeper[s]" who set a standing bar for plaintiffs.[440] By contrast, this Article seeks to set a lower standing threshold that would still reject duplicative or implausible suits.[441]

C. Federalist Principles Suggest Courts Favor State Plaintiffs over Private Plaintiffs in Injunctive Cases

If a state plaintiff has articulated similar claims, it is more efficient and consistent with federalist principles in the *Massachusetts* decision for federal courts to favor suits by sovereign states over duplicative private claims because states have a unique role in our federalist system of government in protecting the health of their citizens and the natural resources in that state.[442] Because of the separation of powers concerns raised by injunctive relief, courts should interpret *Massachusetts*'s special solicitude for state standing to limit injunctive remedies in climate change cases to states, but to allow private plaintiffs to collect individualized damages.[443] The argument for limiting private remedies to damages is especially strong if private and state plaintiffs are seeking overlapping or duplicative injunctive relief.[444] Even Chief Justice Roberts's dissenting opinion in *Massachusetts*, which criticized giving greater standing rights to states, conceded that *Tennessee Copper* treated states more favorably than private litigants by giving Georgia the right to equitable relief when private litigants could obtain only a legal remedy, and, therefore, there is precedent for giving states a greater right to equitable relief.[445]

In climate change cases, courts should reject private suits seeking duplicative or overlapping injunctive remedies and defer to state suits seeking

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439. *Comer*, 585 F.3d at 864-65; *see supra* Section IV.A.

440. Meier, *supra* note 9, at 1245, 1265-69.

441. *See supra* notes 405-32 and accompanying text; *infra* Section VI.D.

442. *See infra* notes 435-45 and accompanying text.

443. Scrufari, *supra* note 390, at 126-30 (arguing that injunctive relief in climate change cases raises separation of powers concerns while damages remedies are more judicially acceptable); Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1838-43 (2008) (arguing that "[d]amages remedies represent a far less intrusive—and thus far less complex—method of climate change regulation" and can serve as judicial carbon tax). *But see* Jeremy Hessler, Note, *A Temporary Solution to Climate Change: The Federal Common Law to the Rescue?*, 38 HASTINGS CONST. L.Q. 407, 433-36 (2011) (arguing that, contrary to conventional assumption that damages are preferable in climate change suits, injunctive remedies can be acceptable in such suits by using Hand tort formula to decide if Best Available Control Technology is practicable and efficient).

444. *See infra* notes 438-43 and accompanying text.

445. Massachusetts v. EPA, 549 U.S. 497, 537-38 (2007) (Roberts, C.J., dissenting).

injunctive relief because states have a special place in our federalist system and are usually better representatives of the public interest.[446] In *American Electric Power Co. v. Connecticut*, both the states plaintiffs and land trust plaintiffs each sought injunctive relief requiring each defendant "'to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.'"[447] Let us suppose that the state plaintiffs and private plaintiffs had disagreed on the scope of injunctive relief and sought inconsistent remedies. Based on the *Massachusetts* decision's special solicitude standard for state standing, courts should give preference to the injunctive relief sought by sovereign states because they represent more people and broader territory than private individuals or even large public interest organizations.[448]

Even if a private group and a state represented the exact same number of persons, the *Massachusetts* decision recognized that states have a special position in our federalist system.[449] Some scholars have argued that federalist principles entitle states to greater standing rights to challenge generalized grievances even if other parties pursuing similar litigation would be barred by separation of powers principles,[450] although other scholars would limit federalist standing doctrine to situations where a state is challenging federal regulation that preempts state law or otherwise harms its sovereign interests.[451] Additionally, state attorneys general, who typically represent a state in its litigation, can better represent the public interest because they are usu-

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446. *Id.* at 519-20 (majority opinion) (explaining the special status of states in our federalist government); Stevenson & Eckhart, *supra* note 205, at 45-47 (arguing that states deserved greater standing rights in *Massachusetts* because they are usually better representatives of the public interest than private litigants).

447. 131 S. Ct. 2527, 2534 (2011) (quoting J.A. at 110).

448. Stevenson & Eckhart, *supra* note 205, at 45-47 (arguing states deserved greater standing rights in *Massachusetts* because they represent more people and territory than private litigants); *see also Massachusetts*, 549 U.S. at 519 (observing that "Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.").

449. *Massachusetts*, 549 U.S. at 519-20 (explaining the special status of states in our federalist government); *see also* Alden v. Maine, 527 U.S. 706, 728 (1999) (stating that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself").

450. *See, e.g.*, Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 253, 262, 273-84 (2009) ("This relaxation of the injury in fact requirement for *parens patriae* suits that seek to vindicate undifferentiated public rights advances federalism principles and does not violate the principle of separated powers. A foundational element of federalism is the diffusion of power between states and the federal government, with the prospect of the states acting as a check upon unlawful or unwarranted federal power.").

451. *See, e.g.*, Bradford, *supra* note 54, at 1077-78, 1096-1103 (arguing that states should have relaxed standing if federal government injures the state's sovereign interests or preempts state law).

ally elected officials who represent a broad range of constituents. While they can be partisan because of their involvement in the political process, there is a reasonable argument that state attorneys general as the chief legal representative of their state should take precedence in seeking injunctive or class relief over private attorneys.[452] Accordingly, federal courts should follow the federalist principles in the *Massachusetts* decision by giving states priority in climate change suits over private plaintiffs seeking inconsistent injunctive relief. Nevertheless, in many cases, states would voluntarily collaborate with private groups in these suits.[453]

D. Liberal Standing When Private Plaintiffs Seek Individualized Damages

The Ninth Circuit's decision in *Kivalina* held that the CAA displaces federal common law actions for both injunctions and damages.[454] But the case leaves open the possibility of state common law claims. Judge Pro's concurring opinion explicitly observed that the *Kivalina* plaintiffs could pursue any state common law nuisance actions not preempted by federal law.[455] Furthermore, the Supreme Court in *Silkwood* held that even if a federal statute preempts state injunctive relief, it does not necessarily bar state common law claims for damages.[456] Thus, private parties might still be able to pursue state common law actions for damages against GHG emitters even if they cannot seek federal common law claims for damages and even if courts prefer to reserve injunctive remedies for state plaintiffs.

If private plaintiffs like the Comers have alleged unique injuries that no state plaintiff has asserted, then standing may be appropriate if the allegations are plausible, especially if the plaintiff is seeking individualized damages in a state common law action for injuries caused by climate change.[457] Despite the Ninth Circuit's decision in *Kivalina* holding that the CAA displaces federal common law actions for both injunctions and dam-

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452. *See* Mank, *States Standing*, *supra* note 1, at 1780-85 (discussing the advantages and disadvantages of state attorneys general representing their states in *parens patriae* suits); Stevenson & Eckhart, *supra* note 205, at 17 nn.86-87 (reporting that forty-three states elect their attorney general); *id.* at 45-46 (arguing that state attorneys general, especially if elected, have many advantages compared to private litigants in representing public interest in litigation).

453. Stevenson & Eckhart, *supra* note 205, at 46.

454. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012), petition for en banc review denied (9th Cir. Nov. 27, 2012).

455. *Id.* at 866 (Pro, J., concurring).

456. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (concluding that federal statute preempted state injunctive remedies, but did not preempt state damage remedies).

457. Scrufari, *supra* note 390, at 98 ("The plaintiffs most likely to meet the standing requirements in greenhouse gas litigation cases are those who have directly suffered injuries and are seeking monetary compensation for those injuries.").

ages,[458] Judge Pro's concurring opinion demonstrates that *Silkwood* leaves open the possibility of state common law claims for damages.[459] Courts decide standing separately for damages and injunctions because they are separate forms of relief.[460] Plaintiffs seeking individualized damages arguably should face lower standing barriers than those seeking injunctive relief, especially against the government, because injunctive relief raises greater separation of powers concerns by imposing structural and policy changes that, for example, Chief Justice Roberts in his *Massachusetts* dissent argued, should be decided by the political branches rather than the judiciary.[461] Accordingly, in light of the separation of powers concerns raised by injunctive relief, courts should strongly consider interpreting *Massachusetts*'s special solicitude to limit injunctive remedies in climate change cases to states, but possibly allow private plaintiffs to collect individualized damages if pertinent tort principles would support the award of damages to certain plaintiffs.[462] In *Koohi v. United States*, the Ninth Circuit observed, "Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions."[463] Following the Ninth Circuit's approach in *Koohi* and the federalist implications of the *Massachusetts* decision, this Article suggests that courts should deny standing for the private plaintiffs similar to those in the *AEP* decision because they sought duplicative injunctive relief also sought by state plaintiffs, but that the *Comer* plaintiffs possibly could prove standing for their state common law claims since they only sought damages for their individual injuries.[464]

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458. *Kivalina*, 696 F.3d at 858.

459. *See supra* Subsection IV.B.2.

460. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); Scrufari, *supra* note 390, at 114-15.

461. *See* Scrufari, *supra* note 390, at 126-30 (arguing *Comer* and *Kivalina* plaintiffs are more likely to have standing because they seek money damages, unlike injunction sought in *AEP* that raises separation of powers concerns); Zasloff, *supra* note 443, at 1839 ("Damages remedies represent a far less intrusive—and thus far less complex—method of climate change regulation [than injunctive remedies]."). *See generally supra* Subsection II.B.2 (discussing Chief Justice Roberts's dissenting opinion in *Massachusetts*, arguing that climate change policy should be decided by the political branches).

462. *See* Scrufari, *supra* note 390, at 126-30; Zasloff, *supra* note 443, at 1838-39. *But see* Hessler, *supra* note 443, at 433-36 (arguing that, contrary to conventional assumption that damages are preferable, injunctive remedies can be acceptable in climate change suits by using Hand tort formula to decide if remedy is practicable and efficient).

463. 976 F.2d 1328, 1332 (9th Cir. 1992).

464. *See* Scrufari, *supra* note 390, at 98, 126-30 (arguing courts should be more likely to rule in favor of plaintiffs seeking damages for alleged injuries from greenhouse gas emis-

CONCLUSION

Following the Supreme Court's decisions in *Data Processing* and *Steel Co.*, Section VI.A explains why federal courts should strictly separate preliminary standing questions from decisions on the merits.[465] Furthermore, consistent with the Court's precedent in *Bennett*,[466] Section VI.B clarifies the Court's existing approach to standing causation by explicitly treating the traceable causation test as a separate and preliminary test with a lower evidentiary threshold distinct from determining tort causation on the merits; this is because courts should not duplicate causation analysis on the merits when they make the preliminary decision to decide standing.[467] Thus, Section VI.B rejects Professor Meier's approach of importing proximate causation into standing causation.[468] Accordingly, federal judges should be open to recognizing standing in climate change cases even if they harbor serious doubts about whether they could prove their tort claims by a preponderance of the evidence, although they may limit discovery in such circumstances to avoid imposing unnecessary costs on defendants.[469]

As Sections VI.C and VI.D explain, because of the separation of powers concerns raised by injunctive relief, the special role of states in our federalist system, and the usually superior ability of state attorneys general to represent the public interest,[470] courts should interpret *Massachusetts*'s special solicitude principle for state standing to limit injunctive remedies in climate change cases to states because they can better represent broad public interests, but allow private plaintiffs to collect individualized damages if they make plausible allegations of individualized tort harm in a state common law action.[471] Despite the Ninth Circuit's decision in *Kivalina* holding that the CAA displaces federal common law actions for both injunctions and

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sions causing global warming than plaintiffs seeking injunctive remedies that raise separation of powers concerns).

465. *See supra* Section VI.A; Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152-53, 158 (1970).

466. Bennett v. Spear, 520 U.S. 154 (1997); Comer v. Murphy Oil USA, 585 F.3d 855, 864 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

467. *Comer*, 585 F.3d at 864; *see supra* Section VI.B.

468. *See supra* Section VI.B.

469. *See supra* Sections VI.A-B.

470. *See supra* Sections VI.C-D.

471. *See* Scrufari, *supra* note 390, at 126-29; Zasloff, *supra* note 443, at 1839; *supra* Sections VI.C-D. *But see* Hessler, *supra* note 443, at 433-36 (arguing that, contrary to conventional assumption that damages are preferable, injunctive remedies can be acceptable in climate change suits by using Hand tort formula to decide if remedy is practicable and efficient).

damages,[472] Judge Pro's concurring opinion demonstrates that *Silkwood* leaves open the possibility of state common law claims for damages.[473] Thus, private suits alleging individualized damages for state common law claims like those in *Comer* deserve serious consideration for meeting Article III standing requirements as long as there is plausible evidence of causation.[474] The proposed approach by this Article suggests that courts could deny standing for private plaintiffs similar to those in the *AEP* decision because they sought only duplicative injunctive relief better sought by state plaintiffs, but that plaintiffs like the *Comer* plaintiffs arguably should be able to prove standing for any plausible state common law claims for damages.[475]

472. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012), *petition for en banc review denied* (9th Cir. Nov. 27, 2012).

473. *See supra* Subsection IV.B.2.

474. *See supra* Section VI.D.

475. *See supra* Section VI.D.